No. 122.

Brief of Guernsey for D. C.

Filed Nov. 21, 1898.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

NO. 122.

C. P. DEWEY, PLAINTIFF IN ERROR,

vs.

CITY OF DES MOINES, C. H. DILWORTH, COUNTY TREASURER OF POLK COUNTY, AND DES MOINES BRICK MANUFACTURING COMPANY, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF IN BEHALF OF CITY OF DES MOINES AND DES MOINES BRICK MANUFACTURING COMPANY, DEFENDANTS IN ERROR.

N. T. GUERNSEY,
Attorney for Said Defendants in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

C. P. DEWEY, *Plaintiff in Error,*

vs.

CITY OF DES MOINES, C. H. DILWORTH COUNTY TREASURER OF POLK COUNTY, AND DES MOINES BRICK MANUFACTURING COMPANY, *Defendants in Error.*

BRIEF OF THE DES MOINES BRICK MANUFACTURING COMPANY, AND THE CITY OF DES MOINES DEFENDANTS IN ERROR.

In this suit the plaintiff in error, Dewey, seeks to have cancelled certain special taxes levied against him and his property on account of the expense of paving a street in the city of Des Moines.

The city having properly adopted the resolution ordering the pavement on March 15th, 1892, contracted with J. B. Smith & Company to do the work, the contract providing, among other things, that the total cost of the work should be charged to the abutting property, and that the contract-

ors should receive as their compensation the assessment certificates evidencing the assessment to be made by the city to defray the expense of this improvement. Under the laws of Iowa these assessments are a personal liability of the owner as well as a lien on the abutting property.

J. B. Smith & Company having completed the work, the certificates; including those in controversy in this action, were issued May 19th, 1893, and delivered to the contractors. The plaintiff in error was the owner of considerable abutting property included in this assessment. April 30th, 1894, he commenced this suit by filing his bill in equity in the district court of the state of Iowa in and for Polk county, in which he asked a decree cancelling the entire assessment and enjoining the city and county authorities from enforcing it to any extent. The Des Moines Brick Manufacturing Company (which we shall hereinafter designate as the Brick Company) having become the owner of these certificates, was joined with the city and proper county officials as one of the defendants.

Omitting certain purely local matters which are immaterial here, the grounds upon which the plaintiff attacked this assessment were:

(*a*) That no personal liability could be imposed on him because no personal notice of the proceedings contemplated had been given him, the only notice being a notice given by publication in the newspapers and by posting along the line of the work. In this connection to show clearly that a personal liability was inevitable the plaintiff averred that the assessment against each of his lots exceeded the value of that lot and that the aggregate assessment against all his lots exceeded their aggregate value.

(*b*) That the entire proceeding was invalid because the territory where the work in question was done was annexed to the city of Des Moines under an act of the legislature of Iowa which was void because special in its character, and so prohibited by the constitution of that state.

In the record in the trial court the constitution of the United States is nowhere mentioned and no right or immunity is specially set up or claimed under it. There is no allegation that the plaintiff has paid or tendered or that he tenders or offers to pay any part of this tax.

While it is alleged that the assessments exceed the value of the lots, it is not alleged that this was true when the contract was let or when the work was done, or when the assessment was made; nor is there any averment as to the amount of the alleged excess, so that if it were one dollar or one cent it would be sufficient to support the averments of the bill.

The Brick Company answered the bill, and also filed a cross-bill seeking to enforce the certificates against the property and asking a personal judgment against Dewey.

In reply to the cross-bill Dewey set up practically what was contained in his bill.

The Brick Company thereupon filed its motion to strike from the bill and answer to the cross-bill, substantially all the matters relied upon as invalidating the assessment. Counsel having by stipulation agreed that the charges of fraud in the bill be withdrawn, and that the motion be treated as a demurrer, it was, with a general demurrer filed by the other defendants, sustained, and a decree was entered against Dewey for the amount of the certificates which was made a lien upon the lots.

Thereupon Dewey appealed to the supreme court of Iowa. In that court the question made here as to taking property without compensation was not even suggested, nor was it a question which could have been made on the record there. The question growing out of the annexation proceedings urged here was expressly waived there. Consequently neither of the questions as to which it is sought here to review the decision of the supreme court of Iowa, was presented to or considered by that court.

The legislation in Iowa on this subject shows that practi-

cally ever since the state's admission it has been its policy to make special assessments a personal charge against the abutting owner, as well as a lien on his property.

The supreme court of Iowa, in a long line of decisions has upheld these statutes. That court, also many years before the plaintiff in error acquired this property, announced the doctrine which is settled law in Iowa, that special assessments are sufficiently supported as an exercise of the taxing power by the benefit that ensues to the public at large; so that so far as the validity of such assessments is concerned it is unnecessary to consider the benefits to abutting property as compared with the cost of the work, because in this aspect of the matter the amount of such benefits is immaterial.

BRIEF AND POINTS.

I.

The claim that the assessment in controversy constitutes a taking of the property of plaintiff in error without compensation in contravention of the federal constitution was not specially set up or claimed in the court below and cannot be urged here.

This question was not specially set up in the pleadings.

Oxley Stave Co. vs. Butler County, 166 U. S., 648-654.
Louisville & Nashville R. R. Co. vs. Louisville, 166 U. S., 709.
Union Mutual Life Insurance Co. vs. Kirchoff, 18 Sup. Ct. Rep., 260.

The only federal question made by the assignments of error in the supreme court of Iowa was as to the sufficiency of the notice, and no other question could have been urged there.

Powers vs. County of O'Brien, 54 Iowa, 501.

Patterson vs. Jack, 59 Iowa, 632.
Fink vs. Mohn, 85 Iowa, 739.

II.

The failure on the part of the plaintiff in error to tender any part of the assessment constituted a complete defense and rendered the determination of any federal question unnecessary.

State Railroad Tax Cases, 92 U. S., 575.
National Bank vs. Kimball, 103 U. S., 732.
Albuquerque Bank vs. Perea, 147 U. S., 87.
Grimmell vs. City of Des Moines, 57 Iowa, 144.
Morrison vs. Hershire, 32 Iowa, 271.
Dibble vs. Bellingham Bay Land Co., 163 U. S., 63.
Eustis vs. Bolles, 150 U. S., 361.
Winter vs. Montgomery, 156 U. S., 385.
Hammond vs. Johnston, 142 U. S., 73.
Hammond vs. Gordon, 150 U. S., 633.

III.

The tax in controversy was not a taking of private property for a public purpose without compensation.

(*a*) The power exercised was the power of taxation and not that of eminent domain.

Bauman vs. Ross, 167 U. S., 589.
County of Mobile vs. Kimball, 102 U. S., 691.
Davidson vs. New Orleans, 96 U. S., 97.
Hagar vs. Reclamation District, 111 U. S., 701.
Spencer vs. Merchant, 125 U. S., 345.
Walston vs. Nevin, 128 U. S., 578.
Lent vs. Tillson, 140 U. S., 316.
Illinois Central Railroad Co. vs. Decatur, 147 U. S., 190.
Paulsen vs. Portland, 149 U. S., 30.
Willard vs. Presbury, 14 Wall, 676.

Mattingly vs. District of Columbia, 97 U. S., 687.
Shoemaker vs. United States, 147 U. S., 282.
People vs. Brooklyn, 4 N. Y., 419-430.
City of Parkersburg vs. Tavenner, 26 S. E. Rep., 179.
Cooley on Taxation, page 624.
Rolph vs. City of Fargo, 76 N. W. Rep., 242.

(b) The amount of the benefits is not an open question.

Spencer vs. Merchant, 125 U. S., 345.
Fallbrook Irrigation District vs. Bradley, 164 U. S., 112.
Bauman vs. Ross, 167 U. S., 589.
Cooley on Constitutional Limitations, sixth edition, page 599.

(c) The tax in question is not vulnerable to the objection urged against it.

The argument that the burden exceeds the benefit must fall because of the conclusive determination by the state that the property has been benefited to the extent of the charge made against it.

(d) The legislature of the state had the power to impose this tax.

The law assailed provides for a hearing.

Sec. 10, Chap. 168, Acts 21st General Assembly. (See Appendix).
Polk vs. McCartney, 104 Iowa, 567.
Gilchrest vs. McCartney, 97 Iowa, 138.
Coggeshall vs. City of Des Moines, 78 Iowa, 235.
Dittoe vs. Davenport, 74 Iowa, 66.
Muscatine vs. C., R. I. & P. R. Co., 79 Iowa, 645.
Farwell vs. Des Moines Brick Mfg. Co., 97 Iowa, 286.
Muscatine vs. C., R. I. & P. R. Co., 88 Iowa, 291.
McManus vs. Hornaday, 99 Iowa, 507.
Osburn vs. Lyons, 104 Iowa, 160.
Tuttle vs. Polk, 92 Iowa, 433.

The notice is sufficient.

Davidson vs. New Orleans, 96 U. S., 97.
Hagar vs. Reclamation District, 111 U. S., 701.
Lent vs. Tillson, 140 U. S., 316.
Paulsen vs. Portland, 149 U. S., 30.

The rule in Iowa has always been to impose a personal liability.

See statutes in appendix hereto.
Farwell vs. Brick Co., 97 Iowa, 286.
City of Burlington vs. Quick, 47 Iowa, 222.
Sioux City vs. Independent District, 55 Iowa, 150.

The tax is supported by the benefit to the public aside from the question of benefits to the abutting property.

Dewey vs. City of Des Moines, 101 Iowa, 416.
Warren vs. Henly, 31 Iowa, 31.
City Dubuque vs. Illinois Central R. Co., 39 Iowa, 56.

This being a tax for a public purpose, the entire cost must be raised by taxation, and how this shall be apportioned is a matter of purely legislative discretion.

Davidson vs. New Orleans, 96 Iowa, 97.
Mattingly vs. District of Columbia, 97 U. S., 687.
Willard vs. Presbury, 14 Wall., 676.
County of Mobile vs. Kimball, 102 U. S., 691.
Hagar vs. Reclamation District, 111 U. S., 701.
Spencer vs. Merchant, 125 U. S., 345.
Walston vs. Nevin, 128 U. S., 578.
Lent vs. Tillson, 140 U. S., 316.
Fallbrook Irrigation District vs. Bradley, 164 U. S., 112.
Bauman vs. Ross, 167 U. S., 548.
Rolph vs. City of Fargo, 76 N. W. Rep., 242.

This proceeding is in accordance with what was the settled

law of Iowa when the plaintiff in error acquired his property, and had been the law there for many years heretofore, and is therefore due process of law.

Eldridge vs. Trezenant, 160 U. S., 460.

IV.

The alleged invalidity of the annexation law.

No federal question is presented by the record arising out of this matter.

This question, which arose under the constitution of Iowa, was expressly waived in the supreme court of that state and was not presented to that court.

Answering it upon the merits:

(*a*) It has been adjudicated by the supreme court of Iowa that the municipal organization under the annexation proceedings in question is valid.

State ex rel. vs. City of Des Moines, 96 Iowa, 521.

(*b*) The validity of the municipal organization is not subject to attack in a collateral proceeding of this character.

Shapleigh vs. San Angelo, 167 U. S., 651.
National Life Insurance Co. vs. Board of Education of City of Huron, 62 Fed. Rep. 778, 27 U. S. App., 244.
Beach on Public Corporations, Sec. 55.
Cooley's Constitutional Limitations, sixth edition, page 309-310.
City of St. Louis vs. Shields, 62 Mo., 251.
Town of Geneva vs. Cole, 61 Ill., 397.

(*c*) No federal question could arise here.

McCain vs. City of Des Moines, 84 Fed. Rep., 726.

ARGUMENT.

I.

The claim that the assessment in controversy constitutes a taking of the property of plaintiff in error without compensation in controvention of the federal constitution was not specially set up or claimed in the court below and cannot be urged here.

This contention was not asserted in the *nisi prius* court, or in the supreme court of Iowa; it is presented here for the first time. It was not involved in the case as presented to the supreme court of Iowa; it could not have been urged upon the record there, and was not passed upon by that court.

The only averments in the pleadings upon which reliance is placed in this connection are found in paragraph five of the plaintiff's petition (record page 3) which is as follows:

That plaintiff had no actual notice or knowledge of the resolutions of the city council aforesaid to pave said street until after the completion and acceptance of the work on same, nor did he have any such notice or knowledge of said special tax until he applied to the county treasurer of Polk county for a statement of the general taxes upon his property, in the month of March, 1894. That plaintiff had no actual notice or knowledge that paving certificates had been issued against his property hereinbefore described, nor had he any notice or knowledge of the right or opportunity to sign the waiver upon such paving certificates, provided for in the statute and ordinance under which said work was done; and plaintiff had no constructive knowledge in respect to any of the matters aforesaid, except such as might be afforded by publications in newspapers in the city of Des Moines and posting notices along the street in respect thereto. That the amount of said tax is greater than the reasonable market value of said lots, whether considered singly or together; the assessment against each particular lot being greater in amount than the value of such particular lot, and the aggregate assessment being greater in amount than the reasonable market value of all of said lots taken together; and that said defendants are seeking to enforce as against plaintiff not merely a sale of said lots but also to compel

plaintiff to pay the full amount of said tax regardless of whatever sum said lots may be sold for and regardless of the actual value of the same.

This paragraph does not specially set up or claim the protection of the constitution of the United States. The averments are too general, and whether or not it was intended to assert a federal right is left to mere inference, and is wholly a matter of conjecture. The case of

Oxley Stave Co. vs. Butler County, 166 U. S., 648-654,

is conclusive upon this question. We quote from the opinion as follows:

The only remaining question was not otherwise raised than by the general allegation that the decree was rendered against dead persons as well as in the absence of necessary parties who had no notice of the suit and therefore no opportunity to be heard in vindication of their rights. Do such general allegations meet the statutory requirement that the final judgment of a state court may be re-examined here if it denies some title, right, privilege or immunity "specially set up or claimed" under the constitution or authority of the United States? We think not. The specific contention now is that the decree of the Butler county circuit court in the suit instituted by the county of Butler was not consistent with the due process of law required by the fourteenth amendment of the constitution of the United States. But can it be said that the plaintiffs specially set up or claimed the protection of that amendment against the operation of that decree by simply averring—without referring to the constitution or even adopting its phraseology—that the decree was passed against deceased persons as well as in the absence of necessary or indispensable parties?

This question must receive a negative answer, if due effect be given to the words "specially set up or claimed" in section 709 of the Revised Statutes. These words were in the twenty-fifth section of the Judiciary act of 1789 (1 Stat. 85), and were inserted in order that the revisory power of this court should not extend to rights denied by the final judgment of the highest court of a state, unless the party claiming such rights *plainly and distinctly indicated, before the state court disposed of the case*, that they were claimed under the

constitution, treaties or statutes of the United States. The words "specially set up or claimed" imply that if a party intends to invoke for the protection of his rights the constitution of the United States, or some treaty, statute, commission, or authority of the United States, he must so declare; and, unless he does so declare "specially" (that is, unmistakably), this court is without authority to re-examine the final judgment of the state court. *This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a federal right is left to mere inference.* It is the settled doctrine of this court that the jurisdiction of the circuit courts of the United States must appear affirmatively from the record, and that it is not sufficient that it may be inferred argumentatively from the facts stated. Hence the averment that a party resides in a particular state does not import that he is a citizen of that state. Brown v. Keene, 8 Pet. 115; Robertson v. Cease, 97 U. S. 646, 649. Upon like grounds the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right.

As the argument at the bar indicated some misapprehension as to our decisions upon this subject, it will be appropriate to refer to some of them.

In Maxwell v. Newbold, 18 How. 511, 516, which was a writ of error to the supreme court of Michigan, this court, speaking by Chief Justice Taney, and referring to the twenty-fifth section of the judiciary act of 1789, and the interpretation placed upon it in Crowell v. Randall, 10 Pet. 368, said: "Applying this principle to the case before us, the writ of error cannot be maintained. The questions raised and decided in the state circuit court point altogether for their solution to the laws of the state, and make no reference whatever to the constitution or laws of the United States. Undoubtedly, this did not preclude the plaintiffs in error from raising the point in the supreme court of the state, if it was involved in the case as presented to that court. And whether a writ of error from this court will lie or not depends upon the questions raised and decided in that court. But neither of the questions made there by the errors assigned refer in any manner to the constitution or laws of the United States, except the third, and the language of that is too general and indefinite to come within the provisions of the act of congress, or the decisions of this court. It alleges that the

charge of the court was against, and in conflict with, the constitution and laws of the United States. But what right did he claim under the constitution of the United States which was denied him by the state court? Under what clause of the constitution did he make his claim? And what right did he claim under an act of congress? And under what act, in the wide range of our statutes, did he claim it? The record does not show; nor can this court undertake to determine that the question as to the faith and credit due to the record and judicial proceedings in Ohio was made or determined in the state court, or that that court ever gave an opinion on the question. For aught that appears in the record, some other clause in the constitution, or some law of congress, may have been relied on, and the mind of the court never called to the clause of the constitution now assigned as error in this court." After stating the grounds upon which the decision in Lawler v. Walker, 14 How., 149, was placed, the court proceeded: "So in the case before us the clause in the constitution and the law of congress should have been specified by the plaintiffs in error in the state court, in order that this court might see what was the right claimed by them, and whether it was denied to them by the decision of the state court."

In Hoyt v. Sheldon, 1 Black, 518, 521 (a writ of error to review the final judgment of a New York court), it was contended that full faith and credit were not given by that court to certain legislative enactments and judicial proceedings in the courts of New Jersey, as required by the constitution of the United States. This court, again speaking by Chief Justice Taney, said: "But, in order to give this court the power to revise the judgment of the state court on that ground, it must appear upon the transcript filed by the plaintiff in error that the point on which he relies was made in the New York court, and decided against him, and that this section of the constitution was brought to the notice of the state court, and the right which he now claims here claimed under it. The rule upon this subject is clearly and fully stated in 18 How., 515 (Maxwell v. Newbold), as well as in many other cases to which it is unnessary to refer. This provision of the constitution is not referred to in the plaintiff's bill of complaint in the state court, nor in any of the proceedings there had. It is true, he set out the act of the legislature of New Jersey, the proceedings and decree of the chancery court of that state under it, and the sale of the property in dispute by the authority of the court, which he alleges transferred the title to the vendee under whom he

claims, and charges that the assignment set up by the defendant was fraudulent and void, for the reasons stated in his bill. But all of the matters put in issue by the bill and answers, and decided by the state court, were questions which depended for their decision upon principles of law and equity, as recognized and administered in the state of New York, and without reference to the construction or effect of any provision in the constitution, or any act of congress. This court has no appellate power over the judgment of a state court pronounced in such a controversy, and this writ of error must therefore be dismissed for want of jurisdiction."

This doctrine is reaffirmed in the

Louisville & Nashville Railroad Co. vs. Louisville, 166 U. S., 709.

The court says:

"A definite issue as to the validity of the statute or the possession of the right must be distinctly deducible from the record before the state court can be held to have disposed of such a federal question by its decision."

This doctrine is reaffirmed by this court in the case of the

Union Mutual Life Insurance Co. vs. Kirchoff, 18 Sup. Ct. Rep., 260.

decided January 10, 1898, which is not yet reported in the official series of reports.

Without carrying this discussion further it is manifest that in the averments of the petition itself, and in the record in the trial court, no right under the federal constitution was specially set up or claimed. It is urged here for the first time.

This paragraph of the petition obviously presents solely the proposition that this liability could not be enforced because there had been given no personal notice. The allegation as to the value of the lots, at the end of the paragraph, is shown by the context to have been added solely

for the purpose of making it clear that some personal liability would be inevitable. Whether the pleader intended to invoke the constitution of Iowa, or of the United States or both, is in no wise disclosed.

The fourth assignment of error (record, page 33) embraces this question with another. It is as follows:

The court erred in holding and deciding that plaintiff was personally liable to said Des Moines Brick Manufacturing Company for so much of said special tax or assessment as could not or would not be realized by a sale of the sixty lots in question on special execution, and in ordering and adjudging that a general execution should issue against plaintiff and in favor of said Des Moines Brick Manufacturing Company for the balance of such tax or assessment; and further that, as plaintiff was at all times a non-resident of the state of Iowa and had no personal notice or knowledge of the assessment proceedings, that the imposition of a personal liability against him, in excess of the value of all the lots, was not due process of law and was in contravention of the provisions on that subject of the fourteenth amendment to the Constitution of the United States, as well as in contravention of the provisions of the constitution of the State of Iowa on the same subject.

The first question here suggested is whether by their terms the statutes impose a personal liability. This question of purely state law is discussed in the third subdivision of the opinion of the court below. (Record, page 40.)

The next question is whether the notice upon which this tax was founded was sufficient to sustain it, and here we have for the first time in this record an attempt to specially claim a right under the Constitution of the United States. That this alleged defective notice was the only federal question claimed by counsel for the plaintiff in error in the supreme court of Iowa clearly appears from the following extract from their brief here (page 11) from which we quote.

The counsel for plaintiff in error in the State Court seem to have relied upon one single proposition only as involving

a federal question, to-wit: "As plaintiff was at all times a non-resident of the state of Iowa, and had no personal notice or knowledge of the assessment proceedings, that the imposition of the personal liability against him in excess of the value of all the lots was not due process of law and was in contravention to the provisions on that subject of the fourteenth amendment to the Constitution of the United States."

It is true that this was the only federal question presented to that court; moreover this is the only federal question considered or determined by the supreme court of Iowa in its opinion in this case. (See the fourth division of the opinion, record page 40).

Under the practice of that court this was the only federal question which could be raised in that court on this record, because it was the only federal question raised by the assignment of errors there.

Under the practice in Iowa an equity case which is tried upon the merits in the *nisi prius* court is triable *de novo* in the supreme court and no assignment of errors is necessary. The rule is well settled, however, that where there is an appeal from an order sustaining or overruling a motion or demurrer error must be assigned. The first case in Iowa announcing this doctrin is

Powers vs. County of O'Brien, 54 Iowa, 501.

We quote a single sentence from the opinion.

"We think, considering these sections of the statute together, in connection with the constitutional provision, exception should be taken and errors assigned, whenever a party in an equity case stands upon the ruling upon a motion or demurrer and appeals therefrom."

See also

Patterson vs. Jack, 59 Iowa, 632.

The rule is reaffirmed in

Fink vs. Mohn, 85 Iowa, 739.

We qote the entire opinion:

The plaintiff filed her petition in equity, to which the defendants demurred upon the grounds, among others, that the petition shows on its face that the plaintiff is not entitled to the relief demanded, nor to any relief; that it shows that John Fink, the deceased, made no false representation as to any existing fact to induce the plaintiff to sign the deed, and that it shows that the plaintiff's claim, if she ever had one, is barred by the statute of limitations. The demurrer was sustained on these grounds, to which plaintiff excepted, refusing to further plead. Judgment was entered dismissing her action and for costs, from which she appeals. —Dismissed.

GIVEN, J.—The appellees move to strike the appellant's abstract and argument because no errors had been assigned or pointed out, and because no argument has been made by appellant on any error assigned. By referring to Code, section 2742, it will be seen that it is only "in equitable actions, wherein issue of fact is joined," that the case is triable anew in this court. The case is not before us on issues of fact, for none were ever joined. The appeal is from a ruling on the defendants' demurrer to the plaintiff's petition. In Powers vs. O'Brien County, 54 Iowa, 501, and Patterson vs. Jack, 59 Iowa, 632, it was held that on appeal in an equitable case from a ruling upon motion or demurrer, exceptions must be taken and errors assigned as in an action by ordinary proceedings, and the hearing will be only upon errors assigned. This case furnishes an apt illustration of the propriety of the rule. The appellant's petition is quite lengthy, embracing ten parographs, covering six closely printed pages. The appellant has not pointed out, either by assignment of errors or in argument, wherein it is claimed that the court erred in sustaining the demurrer. The appellees' motion to strike the abstract is sustained, and the appeal DISMISSED.

This rule governed the case at bar, as the only complaint made by Dewey there or here grows out of the ruling on the motion or demurrer of the defendants.

Since, therefore, an assignment of errors was necessary

in the supreme court of Iowa, and Dewey by his assignment of errors there pointed out to the supreme court of Iowa specifically the error which he claims had been made by the court below, he was limited in that court to the particular claim made in this assignment of error. By assigning as error this specific matter he waived the right to assert in the supreme court of Iowa anything else.

It is admitted by his counsel here that Mr. Dewey did not assert in that court anything except the error which he specifically assigned, and it appears from the opinion of that court that this is the only question which it considered or passed upon.

Counsel say in their brief immediately after the extract we have just made from it that they "can discover no reason for thus limiting and narrowing down this constitutional federal question" to this single question that was presented to the supreme court of Iowa. We confidently submit that the facts to which we have just adverted are a conclusive reason why the inquiry in that court was limited to this question, and why in this court another question cannot for the first time be presented and argued. The appellant cannot ask this court to review this case upon a proposition that he not only did not present to the supreme court of Iowa but which he had not the right to present to that court.

The plaintiff in error is bound to affirmatively show that the rights which he claims here were specially claimed under the federal constitution in the court below. He not only has failed to do this, but further than this the record affirmatively shows that his sole proposition here, viz., that his property was taken without compensation, was not raised in the supreme court of the state and could not have been raised upon the record presented to that court.

The question of notice, which was the only matter set up, or urged, in the supreme court of the state, has been abandoned by counsel; their argument here is based wholly on

the claim that the plaintiff's property was taken without compensation, a matter not even suggested before the case reached this court. This question was not presented to the *nisi prius* court; it was not presented to the supreme court of Iowa; it was not passed upon by that court; it is not even referred to in its opinion.

There is no decision of the state court on this question which it is possible for this court to review in this case.

II.

The failure on the part of the plaintiff in error to tender any part of the assessment constituted a complete defense and rendered the determination of any federal question unnecessary.

The allegations of paragraph five of the plaintiff's petition (record, page 5) are that the assessment against each lot was in excess of the value of such lot, and that the aggregate assessment exceeded the reasonable market value of all of the lots.

The plaintiff in error does not set out in what amount he claims the assessment exceeded the value of the lots. If this excess were in his opinion one dollar or one cent it would support the averments of his bill.

By section 479 of the code of 1873 of Iowa, it is provided that where the court is satisfied that work has been done or materials furnished which would form the proper basis of an assessment, "a recovery shall be permitted or a charge enforced to the extent of the proper proportion of the value of the work or materials which would be chargeable on such lot or lands notwithstanding any informality, irregularity or defect in any such municipal corporation or any of its officers." By the same section the court is authorized to make such order as to the costs as is deemed proper, and to render a personal judgment. This section is set out in full in the appendix to this brief. In the case of

Burlington vs. Quick, 47 Iowa, 222, 228,

the supreme court of Iowa construing this section held that if the improvement is such as the city is authorized to make, all errors and irregularities should be discarded and recovery permitted for the proper proportion of the value of the work.

The plaintiff in error does not deny the power to enforce liability up to the value of the lots, and under the statute to which we have just referred no defect in the proceedings could have entirely relieved the plaintiff in error from liability. Notwithstanding these facts the plaintiff in error brought his suit in the court below asking that the certificates be cancelled, the tax annulled, and the county officers enjoined from enforcing it, without alleging that he has paid or offered to pay any part of the tax; nor does he tender any part of it. It is the settled law of this court that under such circumstances the plaintiff in error is not entitled to relief in a court of equity. In the

State Railroad Tax Cases, 92 U. S., 575, 616,

this court goes further and avers that an actual payment of the amount due is necessary before relief can be had in a court of equity. It says (page 616):

Before complainants seek the aid of the court to be relieved of the excessive tax, they should pay what is due. Before they ask equitable relief, they should do that justice which is necessary to enable the court to hear them. * * * * It is not sufficient to say in the bill, that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be thus tied up as to that of which there is no contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax it must be tendered, and tendered without the condition annexed of a receipt in full for all the taxes assessed.

We are satisfied that an observance of this principle would prevent the larger part of the suits for restraining collection of taxes which now come into the courts. We lay it down

with unanimity, as a rule to govern the courts of the United States in their action in such cases. Cooley on Tax. 537; Palmer v. Napoleon, 16 Mich., 176; Hersey v. Supervisors, 16 Wis., 185; Roseberry v. Huff, 27 Ind., 12; Frazer v. Liebon, 16 Ohio St., 614; Parmely and Others v. The Railroad Companies, 3 Dill., 19.

The same rule is announced in the

National Bank vs. Kimball, 103 U. S., 732,

and again in

Albuquerque Bank vs. Perea, 147 U. S., 87.

In the case last mentioned it will be noticed that a demurrer to the bills was sustained and the bills dismissed, and that the appeal was from the ruling on this demurrer. In the case at bar the parties stipulated that the motion should be treated as a demurrer. The tenth ground of division one of the motion (record, bottom of page 26) is as follows:

That said improvement having been completed and plaintiff having failed to pay or offer to pay any part of the cost thereof, he cannot in this proceeding be heard to complain thereof.

This shows that this question was unequivocally made at the very outset of this controversy in the trial court.

The rule announced in the decisions of this court to which we have just referred is the rule which has been adopted by the supreme court of Iowa. See

Grimmell vs. City of Des Moines, 57 Iowa, 144-149,

from which we quote as follows:

But if the plaintiff has just ground of complaint because of the inequality of the assessment she has not put herself in position to claim relief in equity. She does not deny that she is justly liable under the ordinance, if it be valid, for a

portion, at least, of the assessment. She cannot defeat the whole assessment, and chancery will not hear her complaint unless she pay or offer to pay the part of the tax justly due. Morrison et al. vs. Hershire, 32 Iowa, 271.

See also to the same effect,

Morrison vs. Hershire, 32 Iowa, 271.

This proposition, which is entirely independent of any federal question, is in itself sufficient to support the conclusion which was reached by the court below, and it was not necessary for the determination of this case to decide any federal question.

It is true that in the opinion of the supreme court of Iowa no reference is made to this question, although the question was argued in that court. The question, however, is in the case and is sufficient to support the ruling of the supreme court of the state of Iowa without any reference to any federal question whatever, and on account of this question the determination of the case must have been adverse to the plaintiff in error whatever conclusion was reached upon the federal question. Under these circumstances it is entirely clear that this court has no jurisdiction. See

Dibble vs. Bellingham Bay Land Co., 163 U. S., 63.
Eustis vs. Bolles, 150 U. S., 361.
Winter vs. Montgomery, 156 U. S., 385.
Hammond vs. Johnston, 142 U. S., 73.
Hammond vs. Gordon, 150 U. S., 633.

III.

The tax in controversy was not a taking of private property for a public purpose without compensation.

The argument of counsel is that the averments of the bill filed by the plaintiff in error show that the benefits derived by his property from this assessment are less than the

amount of the assessment, and that therefore to compel him to pay this tax is to take his property without due process of law.

In connection with this matter several subordinate questions suggest themselves—

(a) The power exercised was the power of taxation and not that of eminent domain.

The fundamental error in the argument of counsel for the plaintiff in error is that they have confused the power of eminent domain with that of taxation. They rely upon the case of the

Chicago, Burlington & Quincy R. R. Co. vs. City of Chicago, 166 U. S., 226,

as conclusive in their favor, and with reference to it say (brief, page 27):

"We apprehend, however, that the question as to whether the taking of private property for public use without just compensation is a denial of due process of law is definitely settled by the decision of this court in" that case.

In the case just referred to the question was whether a taking of the right of way of a railroad company by a city for street purposes without compensation would constitute a denial of due process of law, and this question was decided in the affirmative upon the ground that this was an exercise of the right of eminent domain. So far, if at all, as the other case relied upon by counsel,

Scott vs. City of Toledo, 36 Fed. Rep., 385,

supports the contention of the plaintiff in error it conflicts with the decisions of this court in

Bauman vs. Ross, 167 U. S., 589,

and the earlier cases to which we shall later refer at length.

It is conclusively settled by the authorities that special assessments for paving or other local improvement are an exercise, not of the power of eminent domain, but of the power of taxation, and that the necessity for direct compensation which exists where the power of eminent domain is invoked does not exist here. The distinction is clearly pointed out by this court in the

County of Mobile vs. Kimball, 102 U. S., 691-703.

There a tax was levied for the improvement of Mobile harbor. The entire expense was imposed upon the county of Mobile. Objection was made that it constituted a taking of property without just compensation, and was consequently in violation of the constitution; it being contended that the benefits to ensue would accrue to the state at large, while the entire expense was imposed upon a single county, the argument being exactly similar to that made in the case at bar. Mr. Justice Field, who wrote the opinion, distinguishes the right of taxation from that of eminent domain, saying:

The expenses of the work were of course to be ultimately defrayed by taxation upon the property and people of the county. But neither is taxation for a public purpose, however great, the taking of private property for public use, in the sense of the constitution. Taxation only exacts a contribution from individuals of the state or of a particular district, for the support of the government, or to meet some public expenditure authorized by it, for which they receive compensation in the protection which government affords, or in the benefits of the special expenditure. But when private property is taken for public use, the owner receives full compensation. The taking differs from a sale by him only in that the transfer of title may be compelled, and the amount of compensation be determined by a jury or officers of the government appointed for that purpose. In the one case, the party bears only a share of the public burdens; in the other, he exchanges his property for its equivalent in money. The two things are essentially different.

The objection to the act here raised is different from that taken in the state court. Here the objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole state. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties, or other particular subdivisions of the state, or lay the greater share or the whole upon that county or portion of the state specially and immediately benefited by the expenditure.

It may be that the act in imposing upon the county of Mobile the entire burden of improving the river, bay, and harbor of Mobile is harsh and oppressive, and that it would have been more just to the people of the county if the legislature had apportioned the expense of the improvement, which was to benefit the whole state, among all its counties. But this court is not the harbor, in which the people of a city or county can find a refuge from ill-advised, unequal and oppressive state legislation. The judicial power of the federal government can only be invoked when some right under the constitution, laws, or treaty of the United States is invaded. In all other cases, the only remedy for the evils complained of rests with the people, and must be obtained through a change of their representatives. They must select agents who will correct the injurious legislation, so far as that is practicable, and be more mindful than their predecessors of the public interests.

This doctrine has been reaffirmed as to special assessments in the recent case of

Bauman vs. Ross, 167 U. S., 548-588,

in which this whole matter is exhaustively discussed by this court. In that case, referring to a section of an act of congress which authorized the assessment of damages on account of opening and establishing a street against the abutting property, this court says:

The provisions of this section are to be referred, not to the right of eminent domain, but to the right of taxation; and the

general principles applicable to this branch of the case have been affirmed by a series of decisions by this court.

The following decisions in addition to Mobile County vs. Kimball, *supra*, are cited by this court as supporting this proposition:

Davidson vs. New Orleans, 96 U. S., 97.
Hagar vs. Reclamation District, 111 U. S., 701.
Spencer vs. Merchant, 125 U. S., 345, 355, 356.
Walston vs. Nevin, 128 U. S., 578, 582.
Lent vs. Tillson, 140 U. S., 316, 328.
Illinois Central Railroad vs. Decatur, 147 U. S., 190, 198, 199.
Paulsen vs. Portland, 149 U. S., 30.
Willard vs. Presbury, 14 Wall., 676.
Mattingly vs. District of Columbia, 97 U. S., 687.
Shoemaker vs. United States, 147 U. S., 282, 286, 302.

In a very lucid opinion in

People vs. Brooklyn, 4 N. Y., 419-430,

which is particularly commended by this court in Bauman vs. Ross, the same conclusion is reached.

In a recent case in West Virginia,

City of Parkersburg vs. Tavenner, 26 S. E. Rep., 179,

the supreme court of that state says:

Local assessments for local improvements do not depend on the question of eminent domain or police regulations, but belong strictly to the taxing power, for they are merely a substitute for general taxation for the same public purposes, as being more uniform and equitable in their bearing on persons and property. Therefore all that is said in argument about the doctrine of eminent domain has no bearing on the case under discussion.

Many cases to the same effect are cited in

Cooley on Taxation, page 624,

where, referring to the contention that special assessments constitute a taking of property without compensation, the author says:

If special assessments are taxes, the compensation is conclusively presumed to be received by those who pay them. It is only on the assumption that they are laid in the exercise of the power of eminent domain that the objection could have any force whatever. But the distinction between the two cases is very clear. "Taxation exacts money or services from individuals as and for their respective shares of contribution to any public burden. Private property taken for any public use, by right of eminent domain, is taken, not as the owner's share of contribution to a public burden, but as so much beyond his share. Special compensation is therefore to be made in the latter case, because the government is a debtor for the property so taken; but not in the former, because the payment of taxes is a duty, and creates no obligation to repay otherwise than in the proper application of the tax. Taxation operates upon a community or upon a class of persons in a community, and by some rule of apportionment. The exercise of the right of eminent domain operates upon an individual, and without reference to the amount or value exacted from any other individual or class of individuals." Attention to the distinction here pointed out will make clear the fact that special assessments are not an exercise of the eminent domain.

Chief Justice Corliss in an opinion recently delivered by the supreme court of North Dakota exhaustively considers this question, and very clearly demonstrates that the confusion among the special assessment cases is due to a failure to accurately discriminate between taxation and eminent domain. This opinion is perhaps the best of the recent decisions of the state courts on this subject. See

Rolph vs. City of Fargo, 76 N. W. Rep., 242.

(b) The amount of benefits is not an open question.

Inasmuch as usually special assessments are not levied upon the community at large but upon the portion of it embraced within limited districts, it is substantially correct to say that in all special assessments two questions with reference to benefits must be determined at some stage of the proceeding; the class benefited must be determined and the method of apportioning the burden among the members of this class. The class should include those specially benefited, and the assessment should be apportioned among the individuals in proportion to the benefit received by each one.

The determination of these questions lies with the legislature of the state, unless delegated to subordinate bodies which the legislature may charge with this duty; and when these facts have been determined by the legislature or by the subordinate body charged with this function this determination is conclusive. This is true even though the tribunal making this determination be fallible and commit errors which in particular cases work hardships.

These questions have been often discussed and are conclusively determined by the decisions of this court. A case strongly in point is

Spencer vs. Merchant, 125 U. S., 345.

This was a case of street assessment and the question was made squarely whether the parties interested had been deprived of their property without due process of law in violation of the fourteenth amendment to the constitution of the United States. In this case it is clearly held that the legislature has the power to determine what property is benefited and the amount of the benefit, and that this determination by the legislature is conclusive. It covers these questions so completely that we quote from it at length. (Page 352.)

The substance of the former decisions, and the grounds of the judgment sought to be reviewed, can hardly be more compactly or forcibly stated than they have been by Judge

Finch in delivering the opinion of the court of appeals, as follows:

"The act of 1881 determines absolutely and conclusively the amount of tax to be raised, and the property to be assessed and upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason. Litchfield v. Vernon, 41 N. Y., 123, 141; People v. Brooklyn, 4 N. Y., 427; People v. Flagg, 46 N. Y., 405; Horn v. New Lots, 83 N. Y., 100; Cooley on Taxation, 450. The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do so, and may settle both questions for itself; and when it does so, its action is necessarily conclusive and beyond review. Here an improvement has been ordered and made, the expense of which might justly have been imposed upon adjacent property benefited by the change. By the act of 1881, the legislature imposes the unpaid portion of the cost and expense, with the interest thereon, upon that portion of the property benefited which has thus far borne none of the burden. In so doing, it necessarily determines two things, viz.: the amount to be realized, and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision of course must be final. We can see in the determination reached possible sources of error and perhaps even of injustice, but we are not at liberty to say that the tax on the property covered by the law of 1881 was imposed without reference to special benefits. The legislature practically determined that the lands described in that act were peculiarly benefited by the improvement to a certain specified amount which constituted a just proportion of the whole cost and expense; and while it may be that the process by which the result was reached was not the best attainable, and some other might have been more accurate and just, we cannot for that reason question an enactment within the general legislative power. That power of taxation is unlimited, except that it must be exercised for public purposes. Weismer v. Douglas, 64 N. Y., 91. Certainly if the acts of

1869 and 1870 had never been passed, but the improvement of Atlantic avenue had been ordered, the legislature might have imposed one part or proportion of the cost upon one designated district and the balance upon another. Practically just that was done in this case. In Re Van Antwerp, 56 N. Y., 261, an assessment for a street improvement had been declared void by reason of failure to procure necessary consents of property-owners. The legislature made a reassessment, imposing two-thirds of the expense upon a benefited district and one-third upon the city at large. The act was held valid as a new assessment and not an effort to validate a void one.

"These views furnish also an answer to the objection that the only hearing given to the land owner relates to the apportionment of the fixed amount among the lots assessed, and none is given as to the aggregate to be collected. No hearing would open the discretion of the legislature, or be of any avail to review or change it. A hearing is given by the act as to the apportionment among the land-owners, which furnishes to them an opportunity to raise all pertinent and available questions, and dispute their liability, or its amount and extent. The precise wrong of which complaint is made appears to be that the land-owners now assessed never had opportunity to be heard as to the original apportionment, and find themselves now practically bound by it as between their lots and those of the owners who paid. But that objection becomes a criticism upon the action of the legislature and the process by which it determined the amount to be raised and the property to be assessed. Unless by special permission, that is a hearing never granted in the process of taxation. The legislature determines expenditures and amounts to be raised for their payment, the whole discussion and all questions of prudence and propriety and justice being confined to its jurisdiction. It may err but the court cannot review its discretion. In this case it kept within its power when it fixed, first, the amount to be raised to discharge the improvement debt incurred by its discretion; and, second, when it designated the lots and property, which in its judgment, by reason of special benefits, should bear the burden; and having the power, we cannot criticise the reasons or manner of its action. The land-owners were given a hearing, and so there was no constitutional objection in that respect. Nor was that hearing illusory. It opened to the land-owner an opportunity to assail the constitutional validity of the act under which alone an apportionment could be made, and that objection failing, it opened the

only other possible questions, of the mode and amounts of the apportionment itself. We think the act was constitutional. 100 N. Y., 587-589."

The general principles upon which that judgment rests, have been affirmed by the decisions of this court.

The power to tax belongs exclusively to the legislative branch of the government. United States v. New Orleans, 98 U. S., 381; Meriwether v. Garrett, 102 U. S., 472. In the words of Chief Justice Chase, condensing what had been said long before by Chief Justice Marshall, "The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected." Veazie Bank v. Fenno, 8 Wall., 533, 548; McCulloch v. Maryland, 4 Wheat., 316, 428; Providence Bank v. Billings, 4 Pet., 514, 563. See also Kirtland v. Hotchkiss, 100 U. S., 491, 497. Whether the estimate of the value of the land for the purpose of taxation exceeds its true value, this court on writ of error to a state court cannot inquire. Kelley v. Pittsburgh, 104 U. S., 78, 80.

The legislature in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion. Willard v. Presbury, 14 Wall., 676; Davidson v. New Orleans, 96 U. S., 97; Mobile County v. Kimball, 102 U. S., 691, 703, 704; Hagar v. Reclamation District, 111 U. S., 701. If the legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law. McMillen v. Anderson, 95 U. S., 37; Davidson v. New Orleans, and Hagar v. Reclamation District, above cited.

In Davidson v. New Orleans, it was held that if the work was one which the state had the authority to do, and to pay for by assessments on the property benefited, objections that the sum raised was exorbitant, and that part of the property assessed was not benefited, presented no question under the fourteenth amendment to the constitution upon which this court could review the decision of the state court. 96 U. S., 100, 106.

Proceeding in the Merchant case the court says:

But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class *which the legislature has conclusively determined to be benefited.*

It says further:

But in the statute of 1881 the legislature itself determined what lands were benefited and should be assessed. By this statute the legislature, in substance and effect, assumed that all the lands within the district defined in the statute of 1869 were benefited in a sum equal to the amount of the original assessment, the expense of levying it, and interest thereon; and determined that the lots upon which no part of that assessment had been paid, and which had therefore as yet borne no share of the burden, were benefited to the extent of a certain portion of this sum. That these lots as a whole had been benefited to this extent was conclusively settled by the legislature. The statute of 1881 afforded to the owners notice and hearing upon the question of the equitable apportionment among them of the sum directed to be levied upon all of them, and thus enabled them to contest the constitutionality of the statute; and that was all the notice and hearing to which they were entitled.

This case covers both the power of the legislature to determine, in the first instance, the particular class benefited, and thus the amount of the aggregate benefit to that class, and also to determine the manner in which the assessment shall be apportioned, thus fixing the amount of the individual benefit; and shows clearly that this determination is conclusive. This same doctrine is reaffirmed in

Fallbrook Irrigation District vs. Bradley, 164 U. S., 112.

and the Merchant case is cited with approval in support of all of these propositions in the case of

Bauman vs. Ross, 167 U. S., 589-590.

We call attention also to

Elliott on Roads & Streets, page 393,

and to the many cases cited by him. The author says:

The weight of authority, however, is overwhelmingly in favor of the right of the legislature to determine what property shall be assessed and how the apportionment shall be made. According to the rule generally laid down, no question can be litigated involving the decision of the legislature, or the local authorities upon whom the power to decide has been conferred, concerning the apportionment of the expense; all that is open to investigation is the mode of procedure and the manner of performing the work.

Cooley lays down the same rule. See

Cooley's Constitutional Limitations, Sixth Edition, page 599.

This rule is nowhere questioned, and it is unnecessary to cite further authorities.

(c) The tax in question is not vulnerable to the objections urged against it.

Applying the propositions to which we have just referred, the conclusion must be reached that the objections which the plaintiff in error urges against this tax are not well taken. In the first place the authorities which he cites in support of the doctrine of eminent domain are not in point because the power exercised here is the power of taxation; it is not the right of eminent domain. It is unnecessary to elaborate upon this proposition.

Nor are the premises from which he deduces his conclusion that he has been deprived of property without compen-

sation sound. The argument of counsel is that the benefit received is the limit of the burden that may be imposed: that the assessment certainly exceeds the benefit, because it exceeds what he offered to prove was the reasonable market value of the property at the time it was laid, and that therefore to compel him to pay this excess is to take his property without benefit, consequently without compensation and without due process of law. This argument, however, absolutely ignores the fact that the legislature has determined what the amount of the benefit is and ignores the conclusiveness of this determination. By the statute in question, section ten, (see appendix hereto) it is expressly provided that the total cost shall be charged to the abutting property. Here is an express determination by the legislature that the benefits equal this cost. Following the case of Spencer vs. Merchant, *supra*, it must be held that in enacting this law the legislature of Iowa "necessarily determines two things, viz., the amount to be realized and the property specially benefited by the expenditure of that amount."

The court proceeds:

The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision must of course be final.

These extracts from the opinion of the supreme court of New York are approved by this court. Referring to the amount of the tax imposed by the legislature as compared with the benefits, this court says:

That these lots as a whole had been benefited to this extent was conclusively settled by the legislature. The statute of 1881 afforded to the owners notice and hearing upon the question of the equitable apportionment among them of the

sum directed to be levied upon all of them, and thus enabled them to contest the constitutionality of the statute, and that was all the notice and hearing to which they were entitled.

These propositions are reaffirmed in the later cases decided by this court in which Spencer vs. Merchant is followed.

In the case at bar the amount of the benefits was not an open question. It was conclusively determined by the enactment of this statute, which decided that the entire cost should be included in the assessment. While this "may have been mistakenly unjust" as was undoubtedly the allowance of only one dollar to the Chicago, Burlington & Quincy Railroad Company as damages in the case of that company against the city of Chicago, still this matter having been determined by the proper tribunal and being within its power, the question is at rest and is no longer an open question. It, therefore, is evident that the plaintiff in error had not a right to litigate this question in the trial court, and that the trial court properly struck from his petition the averments from which he seeks to deduce this conclusion.

It is likewise manifest that the entire argument of the plaintiff in error in this court, which is founded upon the assumption that this question of benefits was not determined by the legislature but was an open question which he had a right to litigate in the trial court, is equally unsound. The record does not present a case where it is admitted that the amount of the benefits is less than the amount of the assessment. The record presents a case where the duly constituted authority had determined that the amount of the benefits is equal to the amount of the assessment, and where the plaintiff in error seeks to review the act of the legislature by an appeal to the courts.

As we have already seen this question was not presented to the trial court, nor was it presented to the supreme court of Iowa. It is safe to assume, however, that if it had been presented to either of these courts it would unhesitating-

ly have followed the unbroken line of authorities which announces the conclusion reached by this court, and would have said to the plaintiff in error that his argument must fall because the legislature having determined this matter no extrinsic evidence could be permitted to show that the determination of the legislature was wrong.

We submit that the same conclusion must be reached by this court, and that it having been within the power of the legislature of Iowa to determine this question, and it having been conclusively determined that the benefits here equal the entire cost of the assessment, the case cannot be argued or considered upon the theory that the plaintiff in error should have been permitted to treat this as an open question, to introduce proof upon it in the state court, and to there review the discretion of the legislature in the matter. Unless he had this right the state court did not err in striking from his petition the averments upon which he now relies in this connection. They were properly stricken out because the matter was at rest. Therefore the foundation of his entire argument in this court falls.

(d The legislature of the state had the power to impose this tax.

It is only incumbent upon us to show that the attack which is made by the plaintiff in error upon this tax is unfounded; we are not bound to show that the law in fact is a valid law, and not subject to objections which were not urged below, and are not urged here. We shall discuss this matter as briefly as practicable.

Turning to the law of which a copy is printed in the appendix to this brief, it appears, section 11, that when the work is done the board of public works of the city is required to have a plat prepared showing the separate lots of the ground and the names of all the owners and the amount assessed against each lot or piece of ground, and to give two weeks' notice in two newspapers of the city, and by posting

handbills in conspicuous places on the line of the work, of the time and place where for the period of twenty days thereafter the same may be seen for the correction of errors, and that it is only after the errors have been corrected that the assessment is completed.

The supreme court of Iowa has recognized the right to review the action of the board of public works, and the city, in passing on objections to the assessment by an action in certiorari, which on appeal may be taken to the supreme court of the state.

Polk vs. McCartney, 104 Iowa, 567.
Gilchrest vs. McCartney, 97 Iowa, 138.

Further than this

Coggeshall vs. City of Des Moines, 78 Iowa, 235,
Dittoe vs. Davenport, 74 Iowa, 66.
Muscatine vs. C., R. I. & P. R. Co., 79 Iowa, 645.
Farwell vs. Des Moines Brick Mfg. Co., 97 Iowa, 286,
Muscatine vs. C., R. I. & P. R. Co., 88 Iowa, 291,
McManus vs. Hornaday, 99 Iowa, 507,
Osburn vs. Lyons, 104 Iowa, 160,
Tuttle vs. Polk, 92 Iowa, 432,

sufficiently illustrate the fact that under the laws of Iowa not only is a hearing provided for, but also resort may be had to the courts to test the legality of the assessment. That the notice provided for in section 11 is sufficient to fill the requirements of due process of law cannot be questioned. See

Davidson vs. New Orleans, 96 U. S., 97.
Hagar vs. Reclamation District, 111 U. S., 701.
Lent vs. Tillson, 140 U. S., 316.
Paulsen vs. Portland, 149 U. S., 30.

No claim is made in this court on this question. Many other authorities might be cited if it were necessary.

It must also be conceded that this tax was levied for a public purpose. No authority is necessary to support the proposition that taxation for the purpose of paving streets is for a public purpose.

It is also proper to note that it has been the policy of the state of Iowa for fifty years, substantially ever since its admission as a state, to impose personal liability to the full amount of the tax on account of special assessments. See in the appendix hereto,

> Section 1068, Revision of 1860, re-enacting law of 1848. Section 479 of the Code of 1873.

It thus appears that for many years it has been the settled law of Iowa that a personal liability may be imposed on account of a special assessment. This question was made in the case of

> Farwell vs. Des Moines Brick Manufacturing Co., 97 Iowa, 286,

and was decided in favor of personal liability. No constitutional question was urged there; the case turned upon the construction of statutes of Iowa and the court held that under those statutes personal liability existed. The same conclusion was reached by the court in the present case. In the

> City of Burlington vs. Quick, 47 Iowa, 222,

decided at the December term, 1877, of the supreme court of Iowa, the question was squarely made that personal liability was unconstitutional, and this was overruled. This is affirmed in

> Sioux City vs. Independent School District of Sioux City, 55 Iowa, 150,

where the court says:

The statute makes the tax a personal charge against the owner, and a lien on the real estate, and it has been held this may be done. Quick vs. Burlington, 47 Iowa, 222.

The personal charge is a debt which may be enforced by a personal action against the owner.

The power of the legislature in the premises has not otherwise been questioned in Iowa. It therefore must be, in considering this matter, taken as the settled law in Iowa that a personal liability should be imposed for taxes of this character.

Another proposition is also settled law in Iowa. It is that special assessments as a species of taxation are supported by the general benefit to the community irrespective of the question of the benefit to the abutting property. In the present case the supreme court of Iowa says:

It is sufficient to say that it has been repeatedly held by this court that such improvements of streets is a public object which will support such an assessment regardless of the fact whether or not it is a benefit to the abutting property.

Warren vs. Henly, 31 Iowa, 31.
Morrison vs. Hershey, 32 Iowa, 271.
Gatch vs. City of Des Moines, 63 Iowa, 718; 18 N. W. Rep. 310.
City of Muscatine vs. Railway Company, 88 Iowa, 291; 55 N. W. Rep. 100.

We regard the law upon this question as settled in this state.

The case of Warren vs. Henly, cited above, is the leading case upon this question in Iowa. We therefore quote from it at considerable length, as follows:

Upon the question presented in this case, involving the constitutionality of the city charter, so far as it confers the power upon the city to assess the cost of paving streets upon the abutting lots, we have had no little difficulty in arriving at a conclusion satisfactory to all members of the court. The point has been considered by the different justices who have occupied this bench since the cause was submitted, and, while

there have been diverse views upon the question, a majority concurred in the line of argument and conclusion which I am about to announce. These views have the concurrence of the justices now constituting this bench, and, while some of them are willing to rest the conclusion arrived at upon a course of reasoning different from the one I present, they are satisfied with the results reached in the following discussion.

I am unable to support our conclusions upon this point on the reasoning of the authorities within my reach. My mind, however, is satisfied with the course of argument which I will briefly announce.

The power in question, in my opinion, is derived from the right of taxation, and not from the right of eminent domain, nor is it derived from the police authority of the city.

I know of no restrictions upon the power of taxation except these two:

1. Taxes must be for objects that are public in their nature. It is admitted on all hands that the paving of a street is a public object.

2. They must be uniform. By this I understand that they must not be imposed alone, nor unequally, upon particular individuals or classes. This rule, however, I understand is applicable generally to the *principle or plan* of taxation, and not to specific or particular taxes. It means that all individuals and all classes shall be uniformly taxed. It does not mean that certain particular taxes, as income taxes, licenses, specific taxes upon certain property used as instruments of profit, or articles of luxury, shall be prohibited. These are not uniform in one sense; that is, all do not pay them. They are and must be uniform in another sense; that is, all possessing particular incomes, exercising certain business, and owning the specified property, must be subject to the same tax. They are again not uniform in another sense, for under them the burden of taxation is not uniformly borne. *All* incomes may not be taxed; those of a certain amount may be exempt; licenses may not be imposed upon the exercise of *all* branches of business, and *all* articles of property used for profit or luxury may not be specifically taxed. The rule means that all individuals and all classes must contribute uniformly with like individuals and like classes to the burden of taxation. The manner of imposing this burden must, of necessity, be left to the discretion of the legislative branch of the government. That a tax or a system of taxation may not bear equally upon all, when weighed in the nicest balance of equity and justice, is no reason for holding that it conflicts

with the fundamental and essential rule under consideration. Such a result is inevitable from the nature of things, for it is practically impossible so to form a system of taxation that all will equally bear the burden imposed. We know from experience such to be the fact, and it is unnecessary to cite instances, or enter into an examination of various systems of taxation, in order to sustain this proposition.

In my opinion in the exercise of the power of taxation, the special participation in the benefits of a particular tax, on the part of the tax payer, has nothing to do with the right to impose the tax. A special tax may go into the treasury for the general purpose of the government levying it. The identical revenue thus collected may be used for purposes, from which the tax payers of whom it was received derive directly no benefit, and others, paying not one cent of the special tax, are solely benefited in its disbursement. No objection, therefore, can be raised to a specific tax based upon the application of the money realized therefrom. It is true, however, that taxation is better supported according to our ideas of equity and justice, when the proceeds thereof are appropriated to the direct benefit of the tax payer.

In the case before us the city may, and it is required to, pave the streets. To do this it may levy taxes. All the streets, however, may not need paving; and it would be burdensome and perhaps ruinous to pave all of them. Some particular streets ought this year to be paved; as the city and its business increases, others ought to be paved next year, and so on. Now it is not denied that the paving of each street, as it is required, is a public benefit. That it is an equal benefit to each citizen cannot be claimed. But that it is such a public purpose that each citizen may be taxed therefor, cannot be doubted. If they are paved by a general tax, the burdens and benefits will not be equally borne and received. If each street is paved by a special tax on the abutting lots, it may also be admitted that the burdens and benefits are not equally distributed. The same difficulty exists in each case. When we contemplate the case of a single street, or a single block, the manner of specific taxation upon abutting lots may appear to impose more unequally the burden in relation to the benefits, but when we take in view the fact that *all* the streets of the city, so far as the public good demands, are to be paved in the same way, we see at once that the burdens are more equally distributed. The lots on one street may not be taxed this year, but they will be next, or when the public good requires it. In due time they must bear their

proper burden. If the public good never requires it, all that can be said is, that the tax payer is relieved, because the public interest does not demand the expenditure of revenue realized from such tax. In this view the system is equitable and just. I do not claim that this is perfectly so; I know that it is not. But, as I have before pointed out, no system in my opinion is or can be. But it approximates a just distribution of the burden, and is as near thereto as the system of general taxation for such public improvements can attain.

* * * * *

I find no support for my conclusion upon the ground that the tax may be sustained because the property is benefited by the improvement. The property holder has a right to determine whether he will, or will not, enjoy certain benefits. The city cannot determine that question for him, and tax him in order to bestow them upon him. I base my conclusion upon the simple ground that the object of the taxation—the improvement of the streets—is a public object, which will support it; that the system of taxing the abutting lots, in its practical application, secures such a just and fair distribution of the burden as to be within the rule requiring uniformity of taxation.

This rule is reaffirmed in the later cases. It will be noted that in this case the assessment was assailed as in contravention of the constitution of Iowa, but that the supreme court of the state overruled this contention.

Another matter is pertinent in this connection. Taxes are generally a personal liability in Iowa. This is manifest from the reasoning in the leading case,

City of Dubuque vs. Illinois Central R. R. Co., 39 Iowa, 56, 60.

from which we quote as follows:

The first question, which we now proceed to consider, involves the constitutionality of the statute, by the force of which it is claimed, the taxes sued for are discharged, and are therefore not collectible.

No question is made as to the legality of the assessment and levy of the taxes in question. The lawful power and right of the city to impose them upon the property of the

defendant was determined in the Dunlieth & Dubuque Bridge Co. vs. The City of Dubuque, *supra*. The sole question, then, to be determined in this branch of the case is this: Can the legislature discharge the obligation of the defendant to pay the tax, as it is attempted to be done by the law in question?

It is first necessary to inquire into the nature of the taxes for which suit is brought. They were levied under the authority of law, and are not different in character, as to the obligation resting upon the tax payer to discharge them, from any other legal assessments. As in the case of other taxes, there is a duty resting upon the defendant to pay them, and there is a correlative right of the city to receive and collect them. The law creates this duty and this right. We have here the case of an obligation whereby the defendant is bound to pay the money in suit; the obligation is raised by the law which implies an undertaking of defendant to pay the taxes. The case fills the definition of a contract, a term which, in its more extensive sense, includes every agreement, obligation, or legal tie, whereby one party becomes bound, expressly or impliedly, to another to pay a sum of money, or to do or omit to do a certain act. Bouvier's Dict., Tit. Contract; Chitty's Contracts, p. 2; 3 Blackstone's Com., 158.

By the lawful levy of the taxes in suit, which were assessed against the defendant, and not *in rem*, defendant became personally bound for the payment. This obligation created a debt in the sense of the term when applied to a liability for the payment of money.

It is especially important to bear in mind that the total amount of this tax does not exceed the cost of the improvement; consequently unless this court denies the power of the state of Iowa to make this improvement it must concede the power of the state of Iowa to collect this money, and it can only do this by means of a tax. The legislature of Iowa has determined conclusively that the owners of property abutting upon these premises are benefited to the extent of this tax, and in the exercise of its discretion has seen fit to impose this tax upon them.

It has been repeatedly decided by this court and is the established rule fixed by the unbroken current of authority

that the legislature has the right to determine whether or not the tax shall be laid upon a class and to determine what persons shall constitute that class. This is the end of argument upon this proposition. The constitution of the United States does not limit the power of the states to determine the class upon whom taxes shall be laid. This is all that remains of the contention of the plaintiff in error. Since paving is a legitimate public burden, the expense incident to it not only may be but must be met by taxation, for the public has no other source of revenue; and whether this burden shall be imposed upon the owners of the property specially benefited, or distributed over the public in general, is a matter that rests entirely in the discretion of the legislature. It is wholly outside of the scope of the federal constitution. This has been often decided by this court. The leading case upon the question of special assessments in this court is

Davison vs. New Orleans, 96 U. S., 97.

where this court says, referring to due process of law:

As contributing, to some extent, to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition, as applicable to the case before us:

That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

It was urged there that there was no benefit, and in this connection the court says:

It is also said that part of the property of plaintiff which

was assessed is not benefited by the improvement. This is a matter of detail with which this court cannot interfere, if it were clearly so; but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds.

It was also urged there that there was no power to render a personal judgment. This proposition again was denied, this court saying:

And lastly, and most strongly, it is urged that the court rendered a personal judgment against the owner for the amount of the tax, while it also made it a charge upon the land. It is urged with force, and some highly respectable authorities are cited to support the proposition, that while for such improvements as this, a part, or even the whole of a man's property connected with the improvement may be taken, no personal liability can be imposed on him in regard to it. If this were a proposition coming before us sitting as a state court, or perhaps, in a circuit court of the United States, we might be called upon to decide it; but we are unable to see that any of the provisions of the federal constitution authorizes us to reverse the judgment of a state court on that question. It is not one which is involved in the phrase 'due process of law," and none other is called to our attention in the present case.

This case has been cited with approval by this court in perhaps every case of a like character that has since been determined by it. In

Mattingly vs. District of Columbia, 97 U. S., 687,

this court clearly recognizes the power of the legislature to authorize such assessments and to apportion them in its discretion. We quote from page 692:

It may be that the burden laid upon the property of the complainants is onerous. Special assessments for special road or street improvements very often are oppressive, but that the legislative power may authorize them, and may direct them to be made in proportion to the frontage, area, or market

value of the adjoining property, at its discretion, is under the decision no longer an open question.

In Willard vs. Presbury, 14 Wall., 676-680, this court summarily disposes of the claim that it was not within the power of congress to charge the cost of repaving or repairing streets upon the abutting property, instead of generally upon the city, saying that this power cannot well be denied.

In County of Mobile vs. Kimball, 102 U. S., 691, the question was whether it was within the power of the state by taxation to impose upon a single county the expense of improving Mobile harbor, amounting to about a million dollars, where the benefit was not exclusive in the county but would be shared by the entire state. We have already referred to this case upon the proposition that the power exercised is that of taxation and not that of eminent domain. Referring to the objection just suggested this court in that case says:

When any public work is authorized, it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties, or other particular subdivisions of the state, or lay the greater share or the whole upon that county or portion of the state specially and immediately benefited by the expenditure.

It may be that the act in imposing upon the county of Mobile the entire burden of improving the river, bay and harbor of Mobile is harsh and oppressive, and that it would have been more just to the people of the county if the legislature had apportioned the expenses of the improvement, which was to benefit the whole state, among all its counties. But this court is not the harbor, in which the people of a city or county can find refuge from ill-advised, unequal, and oppressive state legislation. The judicial power of federal government can only be invoked when some right under the constitution, laws, or treaties of the United States is invaded. In all other cases the only remedy for the evils complained of rests with the people, and must be obtained through a change of their representatives. They must select agents who will correct

the injurious legislation, so far as that is practicable, and be more mindful than their predecessors of the public interests.

In Hagar vs. Reclamanation District, 111 U. S., 701-705, this court reaffirmes this doctrine. We quote as follows:

In some states the reclamation is made by building levees on the banks of streams which are subject to overflow; in other states by ditches to carry off the surplus water. Levees on embankments are necessary to protect lands on the lower Mississippi against annual inundations. The expense of such works may be charged against parties specially benefited, and be made a lien upon their property. All that is required, in such cases is that the charges shall be apportioned in some just and reasonable mode, according to the benefit received. Absolute equality in imposing them may not be reached; only an approximation to it may be attainable. If no direct and invidious indiscrimination in favor of certain persons to the prejudice of others be made, it is not a valid objection to the mode pursued that, to some extent, inequalities may arise. It may possibly be that in some portions of the country there are overflowed lands of so large an extent that the expense of their reclamation should properly be borne by the state. But this is a matter of purely legislative discretion. Whenever a local improvement is authorized, it is for the legislature to prescribe the way in which the means to meet its cost shall be raised, whether by general taxation, or by laying the burden upon the district specially benefited by the expenditure.

In Spencer vs. Merchant, 125 U. S., 345, from which we have heretofore quoted at length, the right of the legislature to direct that the entire expense of a public improvement of this character shall be assessed upon the owners of lands benefited thereby, is expressly recognized. This court says:

The legislature in the exercise of its power of taxation has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion.

Walston vs. Nevin, 128 U. S., 578, is a case from Kentucky involving assessments made under a statute which provided that street improvement should "be made at the exclusive costs of the owners of lots in each fourth of a square" and be apportioned according to area. In that case this court held that the Kentucky statute did not authorize the taking of property without due process of law. This court affirmed the case upon motion, quoting from Davidson vs. New Orleans *supra*, with approval, and reaffirming the power of the state to determine the taxing district and the manner of appointment.

In Lent vs. Tillson, 140 U. S., 316, 328, we have another special assessment case. Here again the cases to which we have referred are cited with approval and are followed, the extracts which we have just made from Spencer vs. Merchant being quoted and confirmed.

In Fallbrook Irrigation District vs. Bradley, 164 U. S., 112, this court says, referring to the fourteenth amendment:

It was never intended that the court should, as the effect of the amendment, be transformed into a court of appeal where all decisions of state courts involving merely questions of general justice and equitable considerations in the taking of property should be submitted to this court for its determination. The final jurisdiction of the courts of the states would thereby be enormously reduced and a corresponding increase in the jurisdiction of this court would result, and it would be a great misfortune in each case.

In that case this court expressly affirms Davidson vs. New Orleans, saying:

We reiterate the statement made in Davidson vs. New Orleans, *supra*, that "whenever by the laws of the state or by state authority a tax, assessment, serviture or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordin-

ary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his propery without due process of law, however obnoxious it may be to the other objections."

Referring further to the matter of benefit this court expressly reaffirms the statement made by Justice Miller in Davidson vs. New Orleans upon that proposition.

In the case of Bauman vs. Ross, 167 U. S., 548, these principles have been again announced by this court. The whole matter is there exhaustively discussed, and the right of the legislature to impose the tax, to conclusively determine the amount of the benefits, and to fix the class upon whom the tax is to be levied is unquivocally recognized. In this case also Davidson vs. New Orleans is cited with approval.

These authorities are conclusive upon the question under consideration. There can be no question whatever about the power of the legislature of the state of Iowa to impose this tax. It had the right to levy a tax in order to pave this street, which must be conceded to be a tax for a public purpose. It not only had the right to raise the entire fund necessary for this purpose by taxation, but of necessity was compelled to so raise it, because taxation is the only source of revenue which the state had. It had the power to determine, within its discretion, the class of the people upon whom this tax should be levied, and having determined this its discretion cannot be reviewed by the courts.

If the legislature of Iowa had the right to impose this tax the question of personal liability is entirely immaterial so far as the federal constitution is concerned. This was expressly decided in Davidson vs. New Orleans, *supra*. Indeed it is immaterial from any standpoint. Whether a tax shall be made a personal charge or not in the absence of restrictions in the state constitutions lies in the discretion of the legislature. Whether a lien shall be imposed on account of a tax is purely a matter of legislative discretion. These

are mere matters of detail going to the enforcement of the collection of the tax that is imposed. So far as the federal constitution is concerned no state is bound to make any tax a lien. This is the custom simply because to do so is a necessity to collection from a practical standpoint. So far as the question of power is concerned the state might declare that all taxes should be personal obligations and that none of them should be liens upon any property.

There might have been some difficulty in enforcing this personal liability had not Dewey voluntarily invoked the jurisdiction of the Iowa courts in this suit which resulted in upholding instead of cancelling the tax. Since the plaintiff in error however makes no question here as to the matter of notice, but bases his entire contention on the proposition that the benefits exceed the burden and that therefore his property in excess of the value of the lots is taken without due process of law, probably even this mere reference to these matters is unnecessary.

Before leaving this question we desire to briefly refer to one further matter. It will be remembered that it has been the policy of the state of Iowa practically ever since its admission to impose a personal liability for paving assessments. See the appendix hereto under the head "prior statutes." It has also, as is shown by the authorities we have just cited, for a long time been the settled law in this state that these assessments may be supported by the general benefit to the public without reference to the benefit which may accrue to the owner of the abutting property. It appears from the complainant's bill (record, page 1) that he acquired the title to this property in the year 1888, long after both of the doctrines above referred to had become firmly established as a part of the law of the state of Iowa. He cannot now be heard to claim that the continued enforcement as the law of that state of what has been a part of its law practically ever since its organization involves any lack of due process of law. What he complains of has always been the established

rule in Iowa. It therefore cannot be claimed that there has been any departure from the established principles which constitute due process of law. In this connection we call attention to

Eldridge vs. Trezenant, 160 U. S., 452,

where this court holds that to impose a servitude upon property owned in Louisiana by a non-resident of that state without compensating him therefore does not deprive him of his property without due process of law because by the established law in Louisiana the state was entitled to that servitude.

In closing this branch of our argument we again call attention to

Rolph vs. City of Fargo, 76 N. W. Rep., 242,

which will be found in point upon many of the general propositions that are here involved.

IV.

The alleged invalidity of the annexation law.

In connection with this matter the constitution of the United States is not mentioned in the record until we reach the argument of counsel for the plaintiff in error in this court. By the amendment to his bill the plaintiff in error in the trial court pleaded that what is commonly known as the annexation law, viz.: Chapter one, Acts of the XXIII General Assembly of Iowa, was in contravention of the provision of the constitution of Iowa which requires that all laws, with certain exceptions, shall be general in their application. Founded on this claim was the argument that since the territory where the work in question was done was within the annexed portion of the city, this territory did not legally constitute a part of the city, and that therefore the city had no jurisdiction over it, so that

the contract for the doing of this work and all subsequent proceedings were beyond its jurisdiction and void.

At the time that the present suit was brought there was pending in the state courts an action in *quo warranto* entitled State *ex rel.* West vs. City of Des Moines which directly challenged the validity of the corporate organization of the enlarged city under the provisions of the said chapter one. This *quo warranto* case is reported in the 96th Iowa, page 521, and also 65 N. W. Rep., 818. In that case the supreme court of Iowa decided that while the act was vulnerable to the constitutional objection which we have suggested, still the corporate organization under it was valid by reason of long acquiescence. The case of State *ex rel.* vs. City of Des Moines involved the validity of the municipal organization of the city of Des Moines at the time that the contract in question in this suit was let. It was decided by the supreme court of Iowa that this municipal organization was valid. While that suit was pending and before it was decided by the supreme court the appeal was taken in this suit to the supreme court of Iowa, and error was assigned upon this question in the following language: (See transcript page 32).

Third: That the alleged annexation to the city of Des Moines of the territory which included the lots of plaintiff, under chapter 1, Acts Twenty-third General Assembly (1890) was illegal and void, said statute being a local and special law and in contravention of the constitution of Iowa, as alleged in paragraphs 7 and 8 of plaintiff's petition; and said city of Des Moines had no jurisdiction to improve said street or to levy the special assessment in question, for that reason on plaintiff's said lots.

Before this case was submitted to the supreme court of Iowa, however, the case of State *ex rel.* West had been decided. When counsel for Dewey filed their printed argument in the supreme court of Iowa they expressly waived all questions growing out of this matter of annexation. Inasmuch as the argument was not brought to this court

under the writ of error as a part of the record in the supreme court of Iowa the parties have in this court stipulated that the argument in behalf of Dewey in the supreme court of Iowa upon this question contained only the single paragraph quoted in the said stipulation. This paragraph is as follows:

> One of the grounds alleged for setting aside the assessment was that the territory within which the plaintiff's lots are situated was unlawfully annexed to the city of Des Moines by virtue of chapter 1, Acts Twenty-third General Assembly. The abstract in this case was prepared before the filing of the opinion of this court in *State ex rel. West vs. City of Des Moines*, 65 N. W. Rep., 818; consequently there were included in the record the allegations as to the invalidity of the proceedings by which said territory, including the lots now in question, was annexed to the city. The decision in that case of course eliminates from this any controversy as to that question, and the plaintiff's right to the relief prayed for rests now upon two propositions, the first going to the validity of the entire tax, and the second to the right to enforce and collect the *contract price*.

See the said stipulation which we have printed in the appendix hereto. The supreme court of Iowa consequently did not consider this question. See its opinion, transcript page 34.

With reference to this question, therefore, it is apparent, first, that no right or immunity under the constitution of the United States was specially claimed in the state supreme court; and, second, that the question was never passed upon by that court, but on the contrary even the question under the state constitution was expressly withdrawn from its consideration by counsel. Under these circumstances it is clear that the question cannot be made for the first time here. It apparently is not seriously urged by counsel, and our answer to them will be very brief.

(*a*) The real question is whether or not the annexation proceedings were valid so as to give the city of Des Moines jurisdiction over this territory. This has been conclusively

determined by State *ex rel.* vs. City of Des Moines, *supra*, which is binding upon this court inasmuch as it involves purely state questions. Therefore it has been adjudicated that the city of Des Moines had jurisdiction.

(*b*) The plaintiff in error, a private individual, had not the right to raise the question as to the validity of the municipal organization in a collateral proceeding of this character. See the fourth paragraph of division one of the motion of the Brick Company, record page 26. See

Shapleigh vs. San Angelo, 167 U. S., 651.

National Life Insurance Co. vs. Board of Education of City of Huron, 62 Fed. Rep. 778, 27 U. S. App. 244.

Beach on Public corporations, Sec. 55.

Cooley's Constitutional Limitations, sixth edition, pages 309-310.

City of St. Louis vs. Shields, 62 Mo., 251.

Town of Geneva vs. Cole, 61 Ill., 397.

(*c*) This is not a federal question.

McCain vs. City of Des Moines, 84 Fed. Rep., 726.

The case just cited was decided in the circuit court for the southern district of Iowa, and involved the identical question which is raised here. It was dismissed for want of jurisdiction on a demurrer to the complainant's bill.

V

Much of counsels' argument is merely a violent attack on the exercise of legislative discretion in imposing this tax. It is perhaps arguments of this class that led Justice Miller to say in Davidson vs. New Orleans (page 104):

In fact it would seem, from the character of many of the cases before us, and the arguments made in them, that the

clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.

This branch of counsels' argument we do not propose to answer. We may be pardoned for suggesting that this is not a controversy between the city and the plaintiff in error, but that it is a controversy between the property holder, whose property has received all of the benefit that there is in the improvement and a certificate holder who is in nowise responsible for the situation but whose money has been used to do this work. There is from our standpoint little equity in the contention of the plaintiff in error, that he should have all of the benefits and that we should carry all of the burden. Whether or not this tax is oppressive, whether or not the exercise of the taxing power has in this instance been judicious is not the question that is presented to this court in this case. Over this the court has no jurisdiction. The question is solely a question of power and as to that the unbroken current of authorities leads to but one conclusion.

Respectfully submitted.

N. T. GUERNSEY,

H. T. GRANGER,
J. E. MERSHON,
of Counsel.

Attorney for Des Moines Brick Manufacturing Company and the City of Des Moines, Defendants in Error.

APPENDIX.

STATUTES IN FORCE WHEN PRESENT CONTROVERSY AROSE.

SEC. 465, Code of 1873, (McClain's Code of 1888, Sec. 624). They shall have power to provide for the grading and repairs of any street, avenue, or alley, and the construction of sewers, and shall defray the expenses of the same out of the general funds of such city or town, but no street shall be graded except the same be ordered to be done by the affirmative vote of two-thirds of the city council or trustees.

SEC. 466, Code of 1873, (McClain's Code 1888, Sec. 630). They shall have power to construct side-walks, to curb, pave, gravel macadamize, and gutter any highway or alley therein, and to levy a special tax on the lots and parcels of land fronting on such highway or alley to pay the expense of such improvement. But unless a majority of the resident owners of the property subject to assessment for such improvement, petition the council or trustees to make the same, such improvements shall not be made until three-fourths of the members of such council or trustees shall, by vote, assent to the making of the same.

Sections 478 and 479 of the code of 1873, (McClain's Annotated code of 1888 sections 649 and 650,) are as follows:

SEC. 478. Each municipal corporation may, by a general ordinance prescribe the mode in which the charge on the respective owners of lots or lands, and on the lots or lands, shall be assessed and determined for the purposes authorized by this chapter; such charge, when assessed, shall be payable by the owner or owners at the time of the assessment personally, and shall also be a lien upon the respective lots or parcels of land from the time of the assessment. Such charge may be collected and such lien enforced by a proceeding in law or in equity, either in the name of such corporation, or of any person to whom it shall have directed payment to be made. In any such proceedings, where pleadings are required, it shall be sufficient to declare generally for work and labor done, and materials furnished on the particular street, alley

or highway. Proceedings may be instituted against all the owners or any of them, to enforce the lien against all the lots or land, or each lot or parcel, or any number of them embraced in any one assessment, but the judgment or decree shall be rendered separately for the amount properly chargeable to each. Any proceedings may be severed, in the discretion of the court, for the purpose of trial, review or appeal.

SEC. 479. In any such proceeding, where the court trying the same shall be satisfied that the work has been done, or materials furnished, which, according to the true intent of the act, would be properly chargeable upon the lot or land through or by which the street, alley or highway improved, repaired, or lighted, may pass, a recovery shall be permitted, or a charge enforced, to the extent of the proper proportion of the value of the work or materials which would be chargeable on such lot or land, notwithstanding any informality, irregularity, or defect in any such municipal corporation or any of its officers. But in such case the court may adjudge as to the costs as may be deemed proper, and in cases where an assessment shall have been regularly made, and payment shall have been neglected or refused at the time when the same was required, any municipal corporation may be entitled to demand and recover, in addition to the amount assessed and interest thereon at ten per cent from the time of the assessment, five per cent to defray the expenses of collection, which shall be included in any judgment or decree which may be rendered. The provisions and powers conferred in this chapter from section four hundred and sixty-five to section four hundred and seventy-nine, inclusive, shall apply to cities acting under special charters.

Chapter 168 of the Acts of the XXI General Assembly of Iowa, as amended by Chapter 5 of the Acts of the XXII General Assembly.

AN ACT making further provision with respect to contracts by cities of the first class containing a population of over thirty thousand, for paving and curbing streets, and construction of sewers, and the making and collection of assessments and issuance of bonds or certificates to pay for same.

Be it enacted by the General Assembly of the State of Iowa:

SECTION 1. That all cities of the first-class in this state,

containing according to any legally authorized census or enumeration a population of over thirty thousand shall have the powers and be subject to all of the provisions of this act.

SEC. 2. When the council of any such city shall direct the paving, curbing or sewering of any street or streets the board of public works of such city shall make and enter into contracts for furnishing materials and for curbing and paving or sewering, as the case may be, of any such street or streets either for the entire work in one contract or parts thereof in separate and specified sections as to them may seem best; provided that no work shall be done under any such contract until a certified copy shall have been filed in the office of the city clerk.

SEC. 3. All such contracts shall be made by the board of public works in the name of the city upon such terms of payment as shall be fixed by the council and shall be made with the lowest bidder or bidders upon sealed proposals after public notice for not less than three weeks in at least two newspapers of said city, which notice shall state the kind and amount of work to be done and specify the different kinds of material for which bids shall be received.

SEC. 4. Each contractor shall be required to give a bond to the city with sureties to be approved by the council for the faithful performance of the contract, and the council shall have power to institute suit in the name of the city to enforce all such contracts.

SEC. 5. It shall be the duty of the city engineer to furnish the board of public works with proper grades and lines and see that the work is done in accordance with the ordinances and regulations of the city with respect to such grades and lines.

SEC. 6. For the purpose of providing for the payment of the cost and expense of any such improvement or improvements, the council shall be authorized from time to time, as the work progresses, upon estimates to be furnished by the board of public works, to make requisitions upon the mayor of the city for the issue of bonds of the city in such sums as shall be deemed best, and it shall be the duty of the mayor to make and execute bonds accordingly in the name of the city to an amount not exceeding the amount of the contract price of any such improvement, and the incidentals attending the same. Said bonds to bear the name of the street or streets improved, to be signed by the mayor, and countersigned by the city clerk, and sealed with the corporate seal of the city, and shall all bear the same date, and be payable seven years after date, and redeemable at any time at the

option of the city, and shall bear interest at the rate of not exceeding six per cent. per annum, payable semi-annually.

SEC. 7. When said bonds shall have been issued by the mayor, and sealed with the corporate seal of the city, they shall be delivered to the clerk, who shall register them in a book to be kept for that purpose, and countersign and deliver them to the committee or person authorized to negotiate the same, taking receipts therefor.

SEC. 8. Said committee or person authorized to negotiate said bonds, shall negotiate the same in such manner as they or he may think best, and for such prices as may be obtainable for the same, not less than par, and shall pay all moneys received therefrom to the treasurer of the city, and report to the city clerk, the number of bonds sold, and the amount received therefor, and before delivering the same to the purchaser they shall be countersigned by the said committee or other person so authorized to negotiate the same.

SEC. 9. All *monies* (moneys) received by the city treasurer from the sale of said bonds shall be kept by him in a separate fund and paid out on requisition of the council, accompanied by affidavit of the city engineer, that work has been done or material furnished to the amount of said requisition and that it is required for payment of the same, and all monies (moneys) received by said treasurer shall be kept in the same manner, and subject to all the regulations regarding other money of the city, except that he shall keep a separate account of the same and all interest received upon the same shall be credited to such fund.

SEC. 10. When any such improvement shall have been completed it shall be the duty of the council to ascertain the entire amount of the bonds sold and the interest thereon to the date of completion which shall be taken to be the costs of such improvement and the entire amount of such cost, including the intersection of streets and alleys shall then be assessed by the board of public works and city engineer, constituting the board of assessors, upon the property fronting or abutting upon said improvement, provided that nothing in this act shall be construed as authorizing the council to assess a greater amount than three dollars per lineal foot on account of the construction of sewers; and provided further that the cost of any such improvement shall not be assessed on property belonging to the state.

SEC. 11. The board of public works shall cause a plat of the street or streets on which any improvement shall be made showing the separate lots of ground and the name of all such owners and the amount assessed against each lot or

piece of ground and shall give two weeks' notice in two newspapers of the city and by hand bills posted in conspicuous places on the line of such street or streets, of the time and place where for the period of twenty days thereafter the same may be seen for the correction of errors, and after having corrected such errors as may be made known to them, said board shall file the same in the office of the city clerk and shall deliver a copy of said plat and schedule to the auditor of the county in which said city is situated.

SEC. 12. Said assessment shall be placed on the tax duplicate or list of the county and shall be payable at the office of the county treasurer in seven equal installments with interest at six per centum from the date of the assessment upon the unpaid portion thereof, the first of which with interest on the whole amount at six per cent. shall be payable at the first semi-annual payment of taxes next succeeding the time said assessment is placed on said duplicate and the others annually thereafter, and said assessment shall be collected in the same manner and bear the same penalties when delinquent as now provided by law for the collection of other taxes.

SEC. 13. Said assessments with interest accruing thereon shall be a lien upon the property abutting upon the street or streets on which any such improvement is made from the commencement of the work, and shall remain a lien until fully paid and shall have precedence over all other liens excepting ordinary taxes and shall not be divested by any judicial sale, provided that such lien shall be limited to the lots bounding or abutting on such street or streets, and not exceeding in depth therefrom one hundred and fifty feet.

SEC. 14. The owner of any property against which an assessment shall have been made for the cost of any such improvement, shall have the right to pay the same in full with interest thereon at six per cent. from the time said assessment was made, or after having paid one or more of said seven installments and interest, he may at any time pay in full the balance of his assessments remaining unpaid with interest thereon at six per cent. from the time when the preceding payment became due, and such payment in full shall satisfy and discharge the lien upon said property, and any owner of such property who shall divide the same so that the feet front on any such improvement are divided into separate lots or parcels may discharge the lien in like manner upon any one or more of such lots or parcels, by payment of the amount unpaid thereon calculated by the

ratio of feet front of such lot or lots or parcel or parcels to the feet front of the whole lot.

SEC. 15. All *monies* (moneys) received from assessments shall be appropriated to the payment of the interest and redemption or payment of the bonds, or of the certificates hereinafter provided for as the case may be that shall be issued for said improvements, and if any interest shall become due on any of said bonds, when there is no fund from which to pay the same, the council shall be authorized to make a temporary loan for the payment thereof.

SEC. 16. If by reason of the prohibition contained in section 8, article 11 of the constitution of this state it shall at any time be unlawful for any city to issue bonds as by this act provided, it shall be lawful for such city to provide by ordinance for the issuance of certificates to contractors, who under contract with the city shall have constructed any such improvement, in payment therefor, each of which certificates shall state the amount or amounts of one or more of the assessments made against an owner or owners and lot or lots on account and for payment of the cost of any such improvement, and shall transfer to the contractor, and his assigns, all of the right and interest of such city to, in and with respect to every such assessment, and shall authorize such contractor and his assigns to receive, sue for and collect, or have collected by every such assessment embraced in any such certificate, by or through any of the methods provided by law for the collection of assessments for local improvements, including the provisions of this act.

SEC. 17. Whenever the owner or owners of any lot or lots, the assessment or assessments against which is or are embraced in any such certificate shall severally promise and agree in writing endorsed on such certificate that, in consideration of having the right to pay his or their assessment or respective assessments in installments, they will not make any objection of illegality or irregularity as to their respective assessments, and will pay the same with interest thereon at such rate not exceeding six per cent., as shall by ordinance or resolution of the city council of such city be prescribed and required, he or they shall have the benefit and be subject to all of the provisions of this act authorizing the payment of assessments in annual installments relating to the lien and collection and payment of assessments so far as applicable.

SEC. 18. Any owner of any lot or lots assessed for payment of the cost of any such improvement who will not promise and agree in writing as provided by section seven-

teen hereof, shall be required to pay his assessment in full, when made, and the same shall be collectible by or through any of the methods provided by law for the collection of assessments for local improvements, including the provisions of this act.

SEC. 19. Any mistake in the description of the property or in the name of the owner shall not vitiate the lien.

SEC. 20. The council of any such city shall not have the right to authorize any improvement under this act unless the owners of two-thirds of the feet front of the property abutting upon the street or streets to be improved shall petition therefor, or unless the same shall be voted for by three-fourths of the members of the council.

SEC. 21. Any part or section of any street may be improved under this act as well as an entire street.

SEC. 22. All acts and parts of acts in conflict with this act are hereby repealed.

SEC. 23. This act being deemed of immediate importance shall be in full force and effect from and after its publication in the Iowa State Resister and Des Moines Leader, newspapers published in Des Moines, Iowa.

PRIOR STATUTES.

Sections 34, 38, and 39 of chapter 157 of the acts of the VII General Assembly of Iowa, took effect July 4, 1858, and were substantially reenacted as sections 1064, 1068 and 1069 of the Revision of 1860 of Iowa, which are as follows:

SEC. 1064. They shall have the power to lay off, open, widen, straighten or to narrow or vacate, or to extend and establish, to improve, keep in order and repair, and to light streets, alleys, public grounds, wharves, landing places, and market places, to open and construct, keep in order and repair sewers and drains, to enter upon and take for such of the above purposes as may require it, land or material, and to assess and collect, or on the lots or lands through or by which a street, alley or public highway may pass for the purpose of defraying the expenses of constructing, improving, repairing or lighting such street, alley or public highway in such proportion as to them shall seem just and equitable.

SEC. 1068. Each municipal corporation may by a general by-law or ordinance, prescribe the mode in which the charge on the respective owners of lots or lands, and on the lots or

lands shall be assessed and determined, for the purposes authorized by this act, such charge when assessed shall be payable by the owner or owners at the time of the assessment personally, and shall also be a lien upon the respective lots or parcels of land in the possession of any owner from the time of the assessment, such charge may be collected, and such lien enforced by a proceeding in law, or in equity, either in the name of the municipal corporation, or of any person to whom the municipal corporation shall have directed payment to be made, in any such proceeding at law where pleadings are required, it shall be sufficient to declare generally for work and labor done, and materials furnished on the particular street, alley or highway, and in proceedings in equity when the owner of any lot shall be a non-resident of the county, or unknown notice shall be given by publication in the manner prescribed by law for notice upon absent defendents returned not found, but a publication for one-half the usual time, shall be deemed sufficient, proceedings at law or equity may be instituted against all the owners, or against each or any member of them, as to enforce the lien against all the lots or land, or each lot or parcel or any number of them embraced in any one assessment, but the judgment or decree shall be rendered separately for the amount properly chargeable, any proceedings may be served, in the discretion of the court for the purpose of trial, review or appeal.

SEC. 1069. In any such proceeding where the justice of the peace or the court trying the same, shall be satisfied that work has been done or materials furnished, which according to the true intent of the act would be properly chargeable upon the lot or land through or by which the street, or alley highway improved or repaired or lighted may pass, a recovery shall be permitted, or a charge enforced, to the extent of the proper proportion of the value of the work or materials which would be chargeable on such lot or land notwithstanding any informality, irregularity or defect in any assessment on the part of such municipal corporation, or any of its officers, but in such case the justice or court may adjudge as to costs as may be deemed proper, and in cases where an assessment shall have been regularly made and payment shall have been neglected or refused at the time when the same was required, any municipal corporation shall be entitled to demand, and recover in addition to the amount assessed and interest thereon at ten per cent., from the time of the assessment, five per cent to defray the expenses of collection which shall be included in any judgment or decree which may be rendered.

IN THE SUPREME COURT OF THE UNITED STATES.

C. P. DEWEY, *Plaintiff in Error*,

vs.

CITY OF DES MOINEL, C. H. DILWORTH, COUNTY TREASURER OF POLK COUNTY, AND DES MOINES BRICK MANUFACTURING COMPANY, *Defendents in Error*.

STIPULATION.

It is hereby stipulated that, in the printed argument which was filed in this case in the supreme court of Iowa in behalf of C. P. Dewey, the appellant in that court, and the plaintiff in error in this court, there is contained the following statement which refers to his claim founded upon the portion of the petition which is contained in paragraph seven thereof, which said portion of the petition is set out in the transcript of the record in this court commencing at line fifteen on page nine, and ending with line twenty-seven on page fourteen thereof, including exhibit "A" on page fifteen thereof, the said statement above referred to being in words and figures as follows:

"One of the grounds alleged for setting aside the assessment "was that the territory within which plaintiff's lots are sit- "uated was unlawfully annexed to the city of Des Moines by "virtue of chapter 1, acts Twenty-third General Assembly. "The abstract in this case was prepared before the filing of "the opinion of this court in State *ex rel.* West vs. City of "Des Moines, 65 N. W. Rep. 818; consequently there were in- "cluded in the record the allegations as to the invalidity of "the proceedings by which said territory, including the lots "now in question, was annexed to the city. The decision in "that case of course eliminates from this any controversy as "to that question, and the plaintiff's right to the relief

"prayed for rests now upon two propositions, the first going "to the validity of the entire tax, and the second to the right "to enforce and collect the *contract price*."

It is further stipulated that the printed arguments filed by the said Dewey in the supreme court of Iowa in this case contain no other or further reference to the claims asserted by the said Dewey in the said paragraph seven than that above set out.

Dated this first day of November, A. D. 1898.

ANDREW E. HARVEY,
Counsel for Plaintiff in Error.

N. T. GUERNSEY,
Counsel for Des Moines Brick Manufacturing Company and City of Des Moines, Defendants in Error.

No. 122.

Sup. Ct. of Guernsey for N. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed Jan. 17, 1899.

No. 122.

C. P. DEWEY,
Plaintiff in Error,

vs.

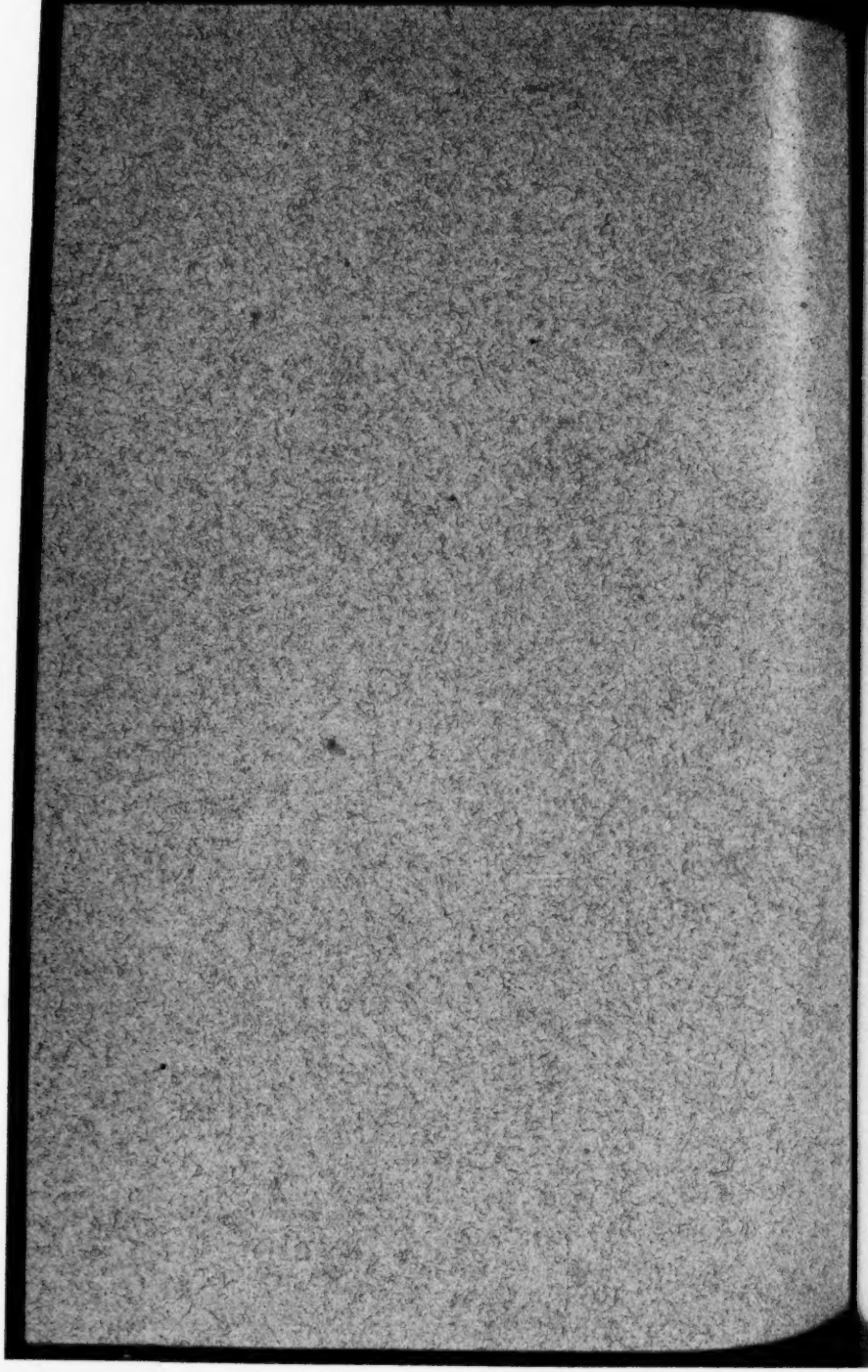
CITY OF DES MOINES ET AL.,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

SUPPLEMENTAL BRIEF OF DEFENDANTS IN ERROR.

N. T. GUERNSEY,
Attorney for Defendants in Error.

C. G. Burgoyne, Walker and Centre Streets, N. Y.



In the Supreme Court of the United States.

OCTOBER TERM, 1898.

C. P. DEWEY,
Plaintiff in Error,

vs.

CITY OF DES MOINES, C. H. DILWORTH, County Treasurer of Polk County, and DES MOINES BRICK MANUFACTURING COMPANY,
Defendants in Error.

SUPPLEMENTAL BRIEF OF THE DES MOINES BRICK MANUFACTURING COMPANY AND THE CITY OF DES MOINES, DEFENDANTS IN ERROR.

I.

The Village of Norwood vs. Baker.

What is decided in the Village of Norwood vs. Baker is that a statute which permits a town to condemn a street through the property of a single land owner, and to assess against the remainder of the tract through which the street runs the damages paid to her, plus the cost of condemnation, without affording her any opportunity to be heard upon the question of benefits, is

unconstitutional, because it authorizes a taking of her property without due process of law.

The conclusion reached in that case may easily be sustained upon the ground that the facts there showed an effort by indirection to exercise the power of eminent domain. There is nothing in the facts in that case which either requires or would warrant the conclusion that the intention was to overrule the long line of decisions, both by this Court and by the State Courts, growing out of cases of taxation by local or special assessments.

The Authorities Cited in Village of Norwood vs. Baker.

Nor is there anything in the authorities cited by this Court in the Village of Norwood vs. Baker which supports such a conclusion. In Macon vs. Patty, 57 Miss., 378, the question was whether each lot owner might be required to improve the street before his separate property. Such assessments have never been sustained. The objection to them is that there is not such uniformity in the apportionment of the burden as is necessary in all cases of taxation.

See Cooley's Constitutional Limitations, 6th Ed., page 625, where the author says :

> " But a very different case is presented when the legislature undertakes to provide that each lot upon a street shall pay the expenses of grading and paving the street along its front, for, while in such a case there would be something having the outward appearance of apportionment, it requires but slight examination to discover that it has a deceptive semblance only, and that the measure of equality which the constitution requires is entirely wanting. If every lot owner is compelled to construct the street in front of his lot, his tax is neither increased nor diminished by the assessment upon his neighbors ; nothing is divided or

apportioned between him and them; and each particular lot is in fact arbitrarily made a taxing district, and charged with the whole expenditure therein, and thus apportionment is avoided. If the tax were for grading the streets simply, those lots which were already at the established grade would escape altogether, while those on either side which chance to be above and below must bear the whole burden, though no more benefited by the improvement than the others. It is evident, therefore, that a law for making assessments on this basis could not have in view such distribution of burdens in proportion to benefits as ought to be a cardinal idea in every tax law. It would be nakedly an arbitrary command of the law to each lot owner only to construct the street in front of his lot at his own expense, according to a prescribed standard; and the power to issue such command could never be exercised by a constitutional government, unless we are at liberty to treat it as a police regulation, and place the duty to make the streets upon the same footing as that to keep the sidewalks free from obstruction and fit for passage."

This meets the suggestion by a member of the Court during the oral argument of the impropriety of taxing to a single block the expense of a court house or other public building.

It will be noted, further, that the Mississippi Court expressly limits its reasoning to single improvements not a part of a general system, and that it substantially concurs in the reasoning of the Iowa Court in cases where, as in the case at bar, the paving in question is only a small portion of work done in the same manner, all the streets being paved in this way. We quote from the opinion, page 405:

"The above reasoning applies to local asssessments, so far as relates to streets, to make a single improvement *which are not of themselves a part of the system which has been already applied, or is then applied, to the whole municipality* and to such as are exceptional in character and expense as com-

pared with the burdens imposed on the rest of the community. *It will be at once perceived that if all the streets in a town are required by the same ordinance to be paved, and that the property owners of each street are to pay the cost of paving their own street, the burden is so equalized that we must regard it as but a method of levying a tax on the whole town; and the same result will follow if a large part of the town had been improved by local assessments on the several streets which had been acquiesced in,* and a similar ordinance for repaving the remainder would steer clear of the difficulties we have mentioned. It is only when the state or a municipality selects a part of the streets to be improved in this way, or selects a part to be improved in a manner exceptionally expensive as compared with the rest of the community, that the persons upon whom the burden is cast should have a right to be consulted."

In the Matter of Canal Street, 11 Wendell, 156, involved merely the question whether, after proceedings had been commenced, the Court had power on the motion of the city, not opposed, to order the proceedings discontinued, the ground of the application being that the public benefit from opening the street would be less than the private loss occasioned thereby. This question of power was the sole question decided in that case.

In McCormack vs. Patchin, 53 Mo., 36, the question was whether a special assessment for the repaving with Nicholson blocks of a street already paved would lie. The Court sustained the power to make the assessment, referring to the Hammett case as the only case against it on this question, and refusing to follow it.

In State, &c., vs. Hoboken, 36 N. J. L., 293, there was a direct attack on the assessment by *certiorari*. There the legislature did not attempt to fix the benefits, but delegated the determination of this question to commissioners, who expressly found that the burden in each instance exceeded the benefit. Under the

statute the assessment was expressly limited to the amount of benefits found.

The Court properly decided that under this statute the assessment, in view of this finding, could not be sustained. In the opinion it throws in the suggestion that if the statute had not contained this provision it would have been unconstitutional.

This statement is purely *dictum*, and entirely foreign to the point decided in the case.

State, Agens pros., vs. Mayor, &c., of Newark, 37 N. J. L., 416, and Bogert vs. City of Elizabeth, 27 N. J. Eq., 568, we assume, arose under this same statute.

Hammett vs. Philadelphia, 65 Pa. St., 146, is not in point, as clearly appears from Michener vs. Philadelphia, 118 Pa. St., 535, to which reference was made on the oral argument. In the Michener case the facts were as follows:

The proceeding was one to enforce a sewer assessment against a lot abutting on three streets, where there had been one sewer constructed across the lot, and it had been assessed to pay for two sewers in the streets adjoining it, the assessment in question being for a sewer upon the third street. It was expressly set up that this sewer was unnecessary and of no benefit to the property owner, but, on the contrary, a positive detriment to his property. This was held to constitute no defense. In the opinion the Court says:

> "Hammett vs. The City appears to be misunderstood to some extent. At least it is frequently cited as covering a much broader view than its facts and the decision thereon warrant. * * * It will thus be seen that none of the cases cited sustains the contention of the plaintiff in error. Of the necessity of the present sewer we cannot, of course, speak, nor are we required to do so. The councils are the sole judges of the necessities of sewers, and their judgment is conclusive. It is not our province to encroach upon the functions of other public officers. * * * The plaintiff alleges, however, that his

property is not benefited by the sewer. He may or may not be mistaken in this. We cannot say. But this is a species of taxation, and all taxations are presumed to be for the benefit, directly or indirectly, of the taxpayer or his property. Laid, as taxes are, under general laws, there will always be cases of apparent individual hardship. The childless man may claim that the taxes which he is compelled to pay for the education of the children of other persons confers no benefit upon him. The law does not so regard it. Education produces a higher degree of intelligence, the fruits of which are seen in increased good order and diminished crime. When a man comes to pay his general taxes he cannot be permitted to allege that he derives no benefit therefrom. And it would be intolerable if in every instance of special taxation the question of benefits should be thrown into the jury box. It would introduce into the municipal government a novel and dangerous feature. It would substitute for the responsibility of councils, limited though it be, the wholly irresponsible and uncertain action of jurors. It is better 'to endure the ills we have than to fly to those we know not of.'"

This doctrine is emphasized by other Pennsylvania cases to which we shall later refer.

Nor is the Vermont case in point so far as the present controversy is concerned. It involved no question of benefits as presented here.

In that case—Barnes vs. Dyer, 56 Vt., 469—there was involved the validity of a law requiring the assessment of the cost of sidewalks upon abutting property. The statute required the assessment to be "just and equitable." The sole question determined was whether the words "just and equitable" sufficiently prescribed a rule for the apportionment of the burden. The Court held they did not, and on this ground alone held the law unconstitutional. In the opinion the Court says:

To secure this protection the courts have held that legislative enactments must set up a stand-

ard, fix a rule to be conformed to as a guide in all cases, and a uniform certain rule, so far as reasonably practical, and not susceptible to different application to different individuals of the class to which it applies. If the enactment fails in this regard it is deemed fatally defective.

In Thomas vs. Gain, 35 Mich., 155, there was involved a similar question, viz., how sewer taxes should be apportioned. It was held that an apportionment by area was unusual, and, under the circumstances of that case, unreasonable. The Court says as to sewers (p. 164):

> "In what has been said it is not intended to decide or to intimate that a sewer tax may not, under some circumstances, be lawful, though apportioned by the area of the lots assessed. If, under the law providing therefor, the assessment were confined exclusively to lots lying contiguously to each other, and on or near the street in which the sewer was to be constructed, and all properly urban lots, or, as they are sometimes designated, in-lots, as distinguished from the outer lots of the town, which receive only slight and indirect benefits from such improvements, and if the law also provided for private drains into the sewer as a matter of right on the part of the proprietors of the lots assessed, the case would be so different from the one now before us that much of what we have said would have no application."

And in the same opinion, referring to assessments such as the one in the case at bar, Judge COOLEY (p. 161) says:

> "It has been decided in this state that assessments for paving and similar taxes may constitutionally be made in proportion to the frontage of lots along the improvement. The idea that underlies statutes for this purpose is that the benefit to the abutting lots is generally in proportion to the length of their respective fronts, and that, as a rule, this principle of apportionment is more just

than any other. There is a basis of truth to this idea, and it is so generally accepted that assessments for street improvements are perhaps now more generally apportioned by the frontage than by any other standard. In Warren vs. Grand Haven, 30 Mich., 74, it was held that the Court could not say, as matter of law, that an assessment for a sewer estimated by the foot-front of abutting lots was not laid in proportion to actual or probable benefit."

This review of the authorities cited in the Village of Norwood case demonstrates that they do not warrant the conclusion that the legislature has not power to determine that an abutting lot is benefited by paving to the extent of the cost of the improvement. None of these cases involves this exact question, and we believe that the extracts which we have made show clearly that so far as they have touched upon this question, these courts support the contention of the defendant in error here.

Other State Authorities.

That this conclusion is sound is demonstrated by numerous cases, not cited in the Village of Norwood case, to which reference might be made.

In Davies vs. City of Saginaw, 87 Mich., 439, 451-2, where the objection was made that the assessment was not limited to the special benefits received, it is held that the conclusion of the city council upon this matter was final.

See, also, Shimmons vs. City of Saginaw, 104 Mich., 511.

The leading case in Michigan on the question of special assessments is Williams vs. Mayor, etc., of Detroit, 2 Mich., 560. This was a bill to enjoin a special assessment for paving, which was laid in proportion to the frontage, as was the assessment in the case at bar. We call special attention to the opinion in this case

upon the constitutional question. It considers the question fully, and decides that this method of apportionment is a fair method of apportioning the burden, and that it does not constitute taking property without due process of law, but is an exercise of the right of taxation. We cannot forbear making a single extract (pp. 568 & 569); referring to the levy of the assessment in this particular street, the court says:

> "Assuming that the proceedings were regular and in conformity to the law under which they attempted to act, it is difficult to perceive why this should be considered a private and exclusive tax. It was levied under a public law by a municipal corporation, created for local but public purposes, and the proceeds of the assessment were to be devoted to a particular public use. It is not questioned that the common council had power to levy a tax upon the whole city for paving all the streets within its boundaries, and it is conceded that the constitution and the charter would sanction the taxation of each ward for the expense of all improvements in it. Where, then, is the injustice in assessing a smaller district for the expense of improvements within it? The result would be practically the same if the same rule of apportionment is applied. If a ward were assessed for the paving of all the streets within it, such improvements would obviously be a great benefit to the ward, and, although the tax would be more burthensome for the time being than if the expense of these particular improvements were assessed upon the whole city, yet that ward is relieved from the burthen of taxation for similar wards of the city."

This suggests the reasoning of the supreme court of Iowa, with reference to this matter.

In Motz *et al.* vs. Detroit, 18 Mich., 495, the constitutionality of a special assessment was sustained. The opinion is by Judge COOLEY. The case of Williams vs. The Mayor, etc., of Detroit, *supra*, is referred to and is followed.

An examination of these cases will demonstrate that the supreme court of Michigan is committed to the doctrine, first, that the special benefit that is conferred upon a street authorizes the legislature to make the street a taxing district to pay for paving, and, second, that the burden here imposed does not come within the constitutional provision with reference to the exercise of eminent domain. The rule is also clearly recognized that the determination of the legislature is conclusive on the matter of benefits.

See, also, City of St. Louis vs. Ranken, 96 Mo., 497-505, from which we quote as follows:

> "The determination of the question what property of the citizens will be benefited by a public improvement is the exercise of legislative power, whether exercised by the legislature directly or by municipal authorities, to whom the power is delegated for that purpose, and 'due process of law is not essential to its legitimate exercise.' These authorities may determine directly the district in which property will be benefited, and the amount of the benefit, and direct a uniform standard for its apportionment therein."

In Kentucky this is apparently the rule. In Nevin vs. Roach, 86 Ky., 493, affirmed on motion by this court, where it is reported as Walston vs. Nevin, 128 U. S., 578, the Supreme Court of Kentucky says:

> "The question made as to benefits to be derived from a local improvement in order to impose the burden has been raised, if not directly decided, in many of the reported cases, *and, while it has even been shown, and particularly in this case, that no pecuniary gain by an increased value of the property is apparent by reason of such improvements,* it is manifest that such improvements conduce to the rapid and prosperous growth of cities, and result in increasing the value of real estate as such improvements are extended. All such assessments are made upon the idea that the property subject to such is benefited by reason of the charge upon

> it; *but to require the city or the contractor in every case to show the immediate advantages resulting to the owner from the construction and improvement of streets in the way of pecuniary benefit would be to prohibit, in effect, such improvements by means of local burdens.* As said by the special chancellor below, the land may be benefited in many ways and not easily determined upon the basis of money values. * * * This method of assessment has been so long followed by the city government and approved by this court that it no longer remains an open question, and the same may be said of the question of notice to the taxpayer that he may appear and show why he should not pay his proportion of the cost of the improvement."

The rule is recognized in California in the Pacific Bridge Company vs. Kirkham, 64 Cal., 519.

In Minnesota the same doctrine prevails.

See State vs. District Court of Ramsey County, 29 Minn., 62-65. There the Court says:

> "It has been decided in this court that the determination by this board of public works of the facts as to what property is benefited, and the extent of such benefit, is, under the statute, conclusive in the absence of fraud or of demonstrable mistake of fact."

This is the rule in Illinois.

See White vs. The People *ex rel.*, 94 Ill., 604-613, from which we quote:

> "*Whether or not the special tax exceeds the actual benefit to the lot is not material. It may be supposed to be based on a presumed equivalent.* The city council have determined the frontage to be the proper measure of probable benefits. That is generally considered as a very reasonable measure of benefits in the case of such an improvement, and, if it does not in fact in the present case represent the actual benefits, it is enough that the city council have deemed it the proper rule to apply."

Another Pennsylvania case illustrating the rule is The City of Harrisburg vs. McCormick, 129 Pa. State., 213. In that case it was held that the decision on the matter of benefits was final, even though under peculiar circumstances it appeared that the amount of the assessment exceeded the value of the property.

This is the rule in Wisconsin, announced in the case of Lumsden vs. Cross, 10 Wis., 282, 288. This case recognizes the power of the legislature to determine this matter of benefits, and to delegate this power to cities, and points out the remedy for any abuse of this power, which is an appeal to the legislature to limit the authority delegated to municipalities.

The same rule is announced in Kansas, in Atchison, etc., Railroad Co. vs. Peterson, not yet officially reported, but which is to be found in 48 Pac. Rep., 877. This involved both the question of personal liability and the matter of benefits, the assessment being against a railroad which received no actual benefit whatever. Referring to the question of personal liability the Court says:

> "There are but two states in the Union—to wit, California and Missouri—that have held that such assessments cannot be made a personal charge against the resident owners, and these are the authorities cited by counsel in their brief in support of their contention that such assessments cannot be made a personal charge."

The Court proceeds to sustain the personal liability. With reference to the matter of benefits it says:

> "So that, when we have determined that these lands, notwithstanding they are used by the railroad in performance of its duties as a common carrier, are subject to these special assessments, the question of benefits is a fact that the legislative authority has determined and the Court cannot inquire into."

In Little Rock vs. Katzenstein, 52 Ark., 107, the same rule is announced. In that case the Court says:

> "It has been so often said as to become axiomatic that absolute equality in the distribution of benefits and burdens is unattainable, yet it is also virtually held that the very existence of the justice and equity of the power of taxation rests upon the theory of corresponding benefits to the taxpayer."

In conclusion upon the question of benefits the court cites numerous authorities supporting the rule;

> "That the action of the city council in including property in an improvement district is conclusive of the fact that it is adjoining the locality to be effected, except when attacked for fraud or demonstrable mistake."

In passing we may say that it is decided by the supreme court of Pennsylvania, *In re* Centre Street, 115 Pa. St., 253, that it is a matter of legislative discretion whether or not personal liability shall be imposed and that the English rule is to impose personal liability in special assessments.

See Vestry of Bermondsey vs. Ramsey, 6 Law Rep. C. P., 247.
Plumsted Board of Works vs. Ingoldby, 8 Law Rep. Exch., 63.
Same case on appeal, 8 Law Rep. Exch., 174.

It would be interesting if the time within which this brief must be filed would permit it to continue this examination through the remainder of the states. We think it would be found that the rule laid down in the authorities which we have cited is sustained practically without dissent by all the state courts.

Special assessments do not take property without due process of law. We quote from Cooley's Constitutional Limitations, Sixth Edition, page 612, as follows:

> "It has been objected, however, to taxation upon this basis that, inasmuch as the district in

which the burden was imposed is compelled to make the improvement for the benefit of the general public, it is, to the extent of the tax levied, an appropriation of private property for the public use; and, as the persons taxed as a part of the public would be entitled of right to the enjoyment of the improvement when made, such right of enjoyment could not be treated as compensation, for the exaction which is made of them exclusively, and such exaction would, therefore, be opposed to those constitutional principles which declare the inviolability of private property. *But those principles have no reference to the taking of property under legitimate taxation. When the constitution provides that private property shall not be taken for public use without just compensation made therefor, it has reference to an appropriation thereof under the right of eminent domain.* Taxation and eminent domain indeed rest substantially upon the same foundation, as each implies the taking of private property for the public use on compensation made; *but the compensation is different in the two cases.* When taxation takes money for the public use, the tax payer receives, or is supposed to receive, his just compensation in the protection which government affords to life, liberty and property, in the public conveniences which it provides, and in the increase of value of possessions which comes from the use to which the government applies the money raised by the tax; and these benefits amply support the individual burden."

In support of this proposition Judge COOLEY cites numerous cases, The People vs. The Mayor, etc., of Brooklyn, 4 N. Y., 419, which has received the direct approval of this Court, being one of them.

Another well-settled rule is stated by Judge COOLEY in his Constitutional Limitations, sixth edition, page 624, as follows:

"On the other hand, and on the like reasoning, it has been held equally competent to make the street a taxing district and assess the expense of the improvement upon the lots in proportion to the frontage. Here, also, is apportionment by a

rule which approximates to what is just, but which, like any other rule that can be applied, is only an approximation to absolute equality. *But if, in the opinion of the legislature, it is the proper rule to apply to any particular case, the courts must enforce it.*"

The Doctrine of this Court.

The rules so conclusively settled by the state courts are the settled law of this Court. Perhaps the leading special assessment case here is Davidson vs. New Orleans, 96 U. S., 97. In that case the court held that the fact that a personal obligation was imposed did not raise any question under the 14th amendment.

The further objection was raised that the benefits exceeded the burden. Upon this question the court says :

> " It is said that the property of the plaintiff assessed is not benefited by the improvement, but this is a matter of detail with which this court cannot interfere, if it were clearly so ; but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds."

Because in an isolated case there might be an inequality, the court in the Davidson case was not misled into condemning the entire proceeding with the law upon which it was founded.

The next case presenting this question is Mobile County vs. Kimball, 102 U. S., 704. In that case the burden of paying for the improvement of Mobile harbor was fixed upon Mobile county, although the benefit was shared by at least a large part of the remainder of the state. This unequivocally sustains the proposition that the discretion of the legislature to determine that a district specially benefited by an improvement shall bear the burden of that improvement is absolute,

and determines further that the courts have no control whatever over the exercise of this discretion.

An examination of the opinion will show that the conclusion of the court is not founded upon any comparison between the amount of the benefit and the amount of the burden, nor is that even suggested as material.

The next case is Hagar vs. The Reclamation District, 111 U. S., 701. That was a case of an assessment for drainage purposes, and it is there held that where special benefits ensue to a particular district the burden of paying for the improvement may be imposed upon that district, the only limitation of this power being that the imposition shall be uniform and that there shall be an opportunity to be heard. In that case the Court says:

> "Whenever a local improvement is authorized it is for the legislature to prescribe the way in which the means to meet its cost shall be raised, whether by general taxation or by laying the burden upon the district specially benefited by the expenditure."

In Head vs. Amoskeag Mfg. Co., 113 U. S., 9, and Wurts vs. Hoagland, 114 U. S., 606, Davidson vs. New Orleans is cited with approval.

We call special attention to Spencer vs. Merchant, 125 U. S., 345, because in the Village of Norwood vs. Baker this Court expressly distinguishes the two cases.

We have quoted from this case at length in our original brief in this Court (see p. 27).

In this case this Court says:

> "The power to tax belongs exclusively to the legislative branch of the government."

And further:

> "The legislature, in the exercise of its power of taxation, has the right to direct the whole or a

part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of the lands benefited thereby. And the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion."

It says further:

"If the legislature provides for a notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law."

Davidson vs. New Orleans is cited with approval, and the court proceeds:

"In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the state, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit, and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners.

"When the determination of the lands to be benefited is entrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and, if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands

> are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited."

In passing the Court will note that there is no statement that the benefits must exactly equal the burden imposed. What is decided is that, where land is specially benefited, this fact will warrant the legislature in determining that it should constitute a separate taxing district for the purpose of bearing the burden of the improvement which causes the benefit.

The court continues:

> "In determining what lands are benefited by the improvement, the legislature may avail itself of such information as it deems sufficient, either through investigations by its committees, or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction."

The Court then proceeds to hold that the act of the legislature in imposing this assessment upon these lands was a conclusive determination that they had been benefited to the extent of the burden imposed upon them.

In Huling vs. Kaw Valley Ry. & Imp. Co., 130 U. S., 559, and Bell's Gap Ry. Co. vs. Pa., 134 U. S., 232, Davidson vs. New Orleans is again cited with approval.

Lent vs. Tillson, 140 U. S., 316, is another special assessment case. In this case Davidson vs. New Orleans, Hagar vs. Reclamation District, and Spencer vs. Merchant are cited with approval, and the following extract is made from the Merchant case:

> "The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing (and, equally, widening) of a street, to be assessed upon the

owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion."

The Court says further in that case:

"It is contended, however, that the act was so administered as to result in depriving the plaintiffs of their property without due process of law. This contention is material only so far as it involves the inquiry as to whether the tribunals charged by the statute with the execution of its provisions acquired jurisdiction to proceed in respect to the lots or lands in question and the owners thereof. Jurisdiction was, of course, essential before the plaintiff's property could have been burdened with this assessment. But errors in the mere administration of the statute, not involving jurisdiction of the subject and of the parties, could not justify this Court in its re-examination of the judgment of the state court, upon writ of error, to hold that the state had deprived, or was about to deprive, the plaintiffs of their property without due process of law. Whether it was expedient to widen Dupont street, or whether the board of supervisors should have so declared, or whether the board of commissioners properly apportioned the costs of the work or correctly estimated the benefits accruing to the different owners of property affected by the widening of the street, or whether the board's incidental expenses in executing the statute were too great, or whether a larger amount of bonds was issued than should have been, the excess, if any, not being so great as to indicate upon the face of the transaction a palpable and gross departure from the requirements of the statute, or whether upon the facts disclosed the report of the commissioners should have been confirmed, are, none of them, issues presenting federal questions, and the judgment of the state court upon them cannot be reviewed here."

In Paulsen vs. Portland, 149 U. S., 30, the question was as to the validity of a sewer assessment. Among other objections made to it was the claim that the

property of the plaintiffs " was and is a long distance away from said Tanner creek sewer, *and never would or could be benefited by said sewer, and that a considerable portion of said property was lower in elevation than the bottom of said sewer, and that it was physically impossible for said property to be drained into said sewer or to be benefited by it in any way.*"

In an opinion, to which no dissent was indicated, this assessment was upheld.

This case holds that failure in the statute to prescribe a formal notice will not render the statute void, quoting with approval from a Kansas case, as follows :

> " Where a statute authorizes a city to provide for the construction of sewers and drains, and to tax the costs thereof upon the adjacent property owners, but does not require that any notice shall be given to the property owners, held that such failure to require notice does not render the statute unconstitutional or void, but notice must nevertheless be given, and the city would have a broad discretion with reference to the kind of notice and the manner of giving the same."

To digress for a moment, in the case at bar the statute provides for a hearing. If it did not or if this provision were incomplete it would be the duty of the city to provide for one. There is no averment that such provision was not made, nor is there any averment that notice was not given, the only averment on the question of notice being that the notice given was by publication in the newspapers and by posting along the line of the work, which has frequently been held to be sufficient notice in a tax case. This is decided in the Paulsen case and in Lent vs Tillson, *supra.*

It may be said here, as it was said in the Paulsen case, " as the form of the notice and the time of its publication are not affirmatively disclosed in the complaint, it must be assumed that there was no defect in respect to these matters."

This case also recognizes the power exercised there

by the city to determine the territorial district to be taxed for a local improvement.

Another case is Fallsbrook Irrigation District vs. Bradley, 164 U. S., 112.

This case expressly reaffirms Davidson vs. New Orleans.

In taking up the consideration of that case this Court says :

> " If the act violate any provision, express or properly implied, of the federal constitution, it is our duty to so declare it, but if it do not, there is no justification for the federal courts to run counter to the decisions of the highest state courts upon questions involving the construction of state statutes or constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law."

One objection made to the act there was, that no opportunity was given to the land owner for a hearing on the question whether his land was or could be benefited by the proposed irrigation ; and another, that the basis of assessment was not in proportion to the proposed benefits ; and, finally, that land which could not be benefited might be subject to the assessment.

In that opinion this Court recognizes the power of the legislature to settle and determine the question of benefits. This power having been delegated by the act in question to a subordinate tribunal, the Court says :

> " We are of the opinion that the decision of such a tribunal in the absence of actual fraud and bad faith would be, so far as this Court is concerned, conclusive upon that question. It cannot be that upon a question of fact of such a nature this Court has the power to review the decision of the state tribunal which has been pronounced under a statute providing for a hearing upon notice."

Proceeding, this Court says, with reference to this question :

> " The difference between this case and the case of Spencer vs. Merchant (125 U. S., 353) is said by counsel for appellees to consist in the fact that in the Spencer case the lands in question might have been benefited, while here the additional benefit to land already capable of beneficial use without irrigation is in no legal or proper sense a benefit which can be considered for the purpose of an assessment. We think this alleged difference is not material. It is in each case one of degree only, and the fact of the benefit is by the act to be determined after a hearing by the board of supervisors. In this case the board has necessarily decided that question in favor of the fact of benefits by retaining the lands in the district. Unless this Court is prepared to review all questions of fact of this nature decided by a state tribunal where the claim is made that the judgment was without any evidence to support it, or was against the evidence, then we must be concluded by the judgment on such a question of fact, and treat the legal question as based upon the facts as found by the state board."

Referring further to this question of benefits, this court says:

> " A question of this kind would involve no constitutional element, and its solution would depend upon the ordinary jurisdiction of courts of justice over this class of cases. It is not pretended that such jurisdiction has been invoked or exercised here. As was said by Mr. Justice MILLER in Davidson vs. New Orleans (96 U. S., 97), where the objection was made that part of the property was not in fact benefited, 'this is a matter of detail with which this court cannot interfere if it were clearly so, but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds.'"

This court cites to the same effect the Spencer and Lent cases, *supra*.

In Baumann vs. Ross, 167 U. S., 548, all of these authorities are elaborately reviewed, and these proposi-

tions are reaffirmed by this court in a most exhaustive and well-considered opinion.

From the statement which the court there makes of the principles which underlie these cases we take the following extracts:

> "The legislature, in the exercise of the right of taxation, has the authority to direct the whole or such part as it may prescribe of the expense of a public improvement, such as the establishing, or the widening, or the grading or repairing of a street, to be assessed upon owners of lands benefited thereby. * * * The class of lands to be assessed for the purpose may be either determined by the legislature itself, by defining the territorial district or by other designation, or it may be left by the legislature to the determination of commissioners, and may be made to consist of such lands, and such only, as the commissioners shall decide to be benefited."

In this connection the Court characterizes as very able the opinion delivered by Judge RUGGLES in People vs. Brooklyn, *supra*. Continuing in Bauman vs. Ross, the Court says:

> "The rule of apportionment among the parcels of lands benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area or market value of the lands, or in proportion to the benefits as estimated by commissioners. If the legislature, in taxing lands benefited by a highway or other public improvement, makes provision for a notice by publication or otherwise to each owner of land, and for hearing him at some stage of the proceedings upon the question of the proportion of the tax that shall be assessed upon his land, his property is not taken without due process of law."

In Williams vs. Eggleston, 170 U. S., 304, this doctrine is stated as something which cannot be doubted.

The Court says :

> " Neither can it be doubted that if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determining what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement. And in so doing it is not compelled to give notice to parties resident within the territory or permit a hearing before itself, one of its committees or any other tribunal, as to the question whether the property so included within the taxing district is in fact benefited."

It is inconceivable that this court has intended to overrule this line of authorities by the Village of Norwood vs. Baker, in which the only reference to them is the distinction which is drawn between Spencer vs. Merchant and the Baker case.

II.

The rule to be deduced from the authorities.

Every statute which imposes upon a limited district the cost of a public improvement involves the question, first, whether the limits of the district have been properly determined; and, second, whether a proper rule of apportionment has been adopted so that uniformity is secured.

In one of the extracts that we have made from Cooley on Constitutional Limitations, he states what is a matter of common knowledge, that the assessment of the cost of paving a street upon the property abutting on the street in proportion to the frontage has generally been accepted as a proper exercise of the

taxing power, in view of both of the considerations to which reference has just been made. The Norwood case quotes from Cooley on Taxation a statement that special assessments are made upon the assumption of special benefits. There is no conflict between these two statements of this eminent author. There will be found no statement in any reported case, or, we believe, by any reputable author, to the effect that such assessments must be based upon direct and certain benfits which can be shown by proof to equal the amount of the assessment.

If this were true, such an assessment would not be taxation, and to characterize it as a burden, as is done almost universally by the text writers and by the courts, would be a misnomer. A tax does not return in direct compensation all that it exacts. The authorities, to many of which we have referred, hold that benefits are to be considered in determining the taxing district. This is the extent to which they go, however. What the courts have held is, that the discretion of the legislature with reference to fixing taxing districts is not absolutely unlimited, and that it cannot be exercised arbitrarily.

They have uniformly held, however, that the fact of special benefit to abutting property is a sufficient basis for an exercise of legislative discretion constituting such property a taxing district for the purpose of paying for the improvement in question; and have also uniformly held that such action on the part of the legislature is a conclusive determination that the property has been benefited to the extent of the burden imposed upon it. While the great mass of the authorities holds that special assessments are based upon benefits, none of them hold that the amount of the benefit, where the obligation is fixed by the legislature, is an open question; nor do they holds that the benefit must be certain and direct. In this connection we call special attention to the case of Nevin vs. Roach, *supra*, decided by the supreme court of Kentucky.

The rule to be deduced from the authorities is that, where property manifestly derives a special benefit from a local improvement, this fact is sufficient to support a legislative determination that such property shall constitute a special taxing district charged with the expense of this improvement.

This rule is not affected by the Village of Norwood case. All that can be claimed for that case is, that it holds that where there is not any apparent benefit, the legislature cannot arbitrarily establish a taxing district without giving the parties a right to be heard. It is analogous to holding that there is no evidence to support a verdict. But where, as in the case at bar, there is obvious benefit, this the courts all hold supports the finding of the legislature as to the taxing district and benefits.

The Village of Norwood vs. Baker does not touch this proposition. What it holds is that, in a case where no benefit was obvious, but damage was apparent, there existed at least a right to review the conclusion of the legislature on the question of benefits, because this conclusion was apparently not supported by any reason, but was purely arbitrary. This cannot be said of a "front-foot" assessment, which has been again and again sustained as a conclusion of the legislature, not arbitrary, but founded upon sufficient reason.

The Village of Norwood case is more nearly analogous to the Iowa and Kentucky doctrine referred to by Judge COOLEY in his Constitutional Limitations (5th Ed.), page 626, where he says:

> "The Kentucky and Iowa decisions hold that, in a case where they have manifestly and unmistakably done so, the courts may interfere and restrain the imposition of municipal burdens on property which does not properly belong within the municipal taxing district at all. It must be manifest, however, that the effect of the decisions in the states last referred to is to establish judi-

> cially two or more districts within a municipality where the legislature has established one only; and, as this is plainly a legislative function, it would seem that the legislature must be at least as competent to establish them directly as any court can be to do the same thing directly."

It will be noted that it is obvious that this doctrine, upon principle, does not meet with Judge COOLEY'S approval.

III.

This doctrine applied to the case at bar

In the case at bar it must be conceded:

1. That there was benefit to the property by virtue of this pavement, which is such a special benefit as has been uniformly held to warrant an assessment of the cost upon the abutting property.

2. That the method of apportionment is one which has often been sanctioned by the courts as proper—it being (as is said by Judge COOLEY in one of the extracts which we have made from his work on Constitutional Limitations) the usual method in such cases.

3. That this is not a single assessment of the entire cost of the improvement against a single individual, but is an assessment against a few lots for a portion of the cost of a mile of paving, all assessed against abutting property, and laid as a part of a general system of pavement paid for in the same way.

The question presented is whether, under these circumstances, and in a collateral proceeding, although the law affords an opportunity to be heard, the plaintiff

in error can, upon his bald assertion that the tax levied against him exceeds the direct and immediate benefit to him, without saying that this is not due to an error in apportionment without saying that this was true as to any other property affected by this law, without saying that this excess is substantial in amount, and without denying that there are general and indirect benefits which he has received, review the determination of the legislature of Iowa upon this question of benefits.

This is not a question of excess over the value of the lots, because, if the proposition of plaintiff in error is sound, the value of the lots is wholly immaterial. If this question of benefits is an open question, the plaintiff is deprived of his property without due process of law, upon the theory of counsel for plaintiff in error, whenever the direct and positive benefit is less than the burden, whatever the value of the lots may be. If the direct and positive benefit were $50 and the burden were $100, it makes no difference whether the lot be worth $1 or $10,000.

To sustain his contention means to overthrow the entire law of special assessments. It means that the legislature, where it is conceded that there is special benefit to the property, has no power whatever to determine the amount of this benefit, and that its determination is always open to review. It means further that this determination need not be attacked directly, but that a collateral attack will lie. It is even more far-reaching than this. It means that, wherever a tax is levied, the person who is taxed may come in and resist the payment of it on the ground that the direct benefit received by him is less than the burden which the tax imposes.

Taking the averments of the bill of plaintiff in error to be true, this is nothing more nor less than a case where a law imposing a proper burden in a usual and approved manner, only to the usual and ordinary amount, has in its administration worked hardship to a

single individual. This has never been held to condemn such a law as unconstitutional. Even if this be a hard case, it does not warrant this Court in taking away from the legislature authority that has always been conceded to it. The fact that in a single instance its discretion has resulted in hardship is not a violation of any constitutional right; nor is it even strange or unprecedented.

One other suggestion upon this question of benefits: suppose that a special assessment were levied for the portion of the tax which the plaintiff in error concedes equals his benefits, and that a general tax for the balance were levied upon him and upon others; if the argument of plaintiff in error is sound, there would be no benefit to sustain the levy for this balance, and it must fall. This is the logical result of his argument upon this proposition; and yet no consideration of this question can ignore the fact that there existed power to levy a tax upon the proper persons for this entire expense, and that this power may be founded upon the benefit which it is assumed will accrue to them.

IV.

The Right to be Heard.

We call attention again to the provision in the statute with reference to a hearing (see Sec. 11; Brief, p. 58); We also call attention to the Paulsen case, *supra*, which holds that the presumption is that the city supplied any deficiency of the statute in this regard. There is no averment in the bill that the plaintiff in error did not have a right and an opportunity to be heard upon this question of benefits or upon any other question. For this reason, therefore, the case of Village of Norwood vs. Baker is not in point, because the conclusion there is founded upon the proposition that there was no opportunity to be heard.

V.

This question was never raised in the State Court.

This proposition is argued on pages 9 *et seq.* of our original brief.

In addition to the authorities there cited, we call attention to

Kipley vs. Illinois, 170 U. S., 187.
Miller vs. Cornwall, 168 U. S., 131.
Winona & St. P. Land Co. vs. Minn., 159 U. S., 540.

Each of these cases sustains the proposition that, where a statute is assailed as unconstitutional, the federal right must be specially set up and claimed. No such right as is here asserted was set up in this case before it reached this court (see brief of plaintiff in error, p. 19).

(The reference in our brief to page 14 is due to the difference in the paging between the two briefs filed by the plaintiff in error. The reference on page 22 of our brief to page 27 of the brief of plaintiff in error, for the same reason should be to page 44).

To recapitulate what was said at bar on this question an examination of the bill discloses :

1. That there is no reference in it to the constitution of the United States.

2. That there is (transcript, p. 3) a claim set up that there was not sufficient notice to warrant a personal judgment. This, under the repeated decisions of this court, will be presumed to refer to the state constitution, as the federal constitution is not mentioned.

3. It was the duty of plaintiff in error in the state supreme court to assign error upon every question that

he wished to make there, and the failure so to do was a waiver of the right to present the question to that court (see our brief, p. 15 *et seq.*).

4. The only error assigned upon the constitutional questions was based upon this matter of notice (see transcript, p. 34).

The first question suggested in the fourth assignment of error as to personal liability is the question disposed of in the third subdivision of the opinion (transcript, p. 40), on the authority of Farwell vs. Des Moines Brick Mfg. Co., 97 Ia., 286.

This question was whether Chapter 168 (brief, p. 56) repealed Section 479 (brief, p. 56), so as to relieve the plaintiff in error of personal liability under the statute.

The other question was as to the sufficiency of the notice (see 4th paragraph of the opinion; transc., p. 40). The character of the cases cited there, the fact that there is no discussion of this question of benefits or power of the legislature to determine them, the conclusion of the court that "there is no force in *the claim that the plaintiff did not have notice*," and the admission in the brief of plaintiff in error (p. 19) that this was the single question presented to the supreme court of Iowa, demonstrate the correctness of our contention on this proposition. Certainly, it cannot be said that it clearly appears that this question was presented to that court. While the question here argued may be involved in the facts it was not involved in the case. It was not made in the *nisi prius* court; it was not made in the state supreme court; it has not been decided by that court, and no decision of that court on that question can be reviewed in this action.

Respectfully submitted,

N. T. GUERNSEY,

Attorney for Defendants in Error.